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SUPREME COURT, U.S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1948

No. 465

J. S. WOODS, PETITIONER,

vs.

INTERSTATE REALTY COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 15, 1948.

CERTIORARI GRANTED FEBRUARY 7, 1949.

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SECOND AMENDED COMPLAINT.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DIVISION OF THE NORTHERN DISTRICT OF MISSISSIPPI.

No. 272-Civil.

INTERSTATE REALTY COMPANY,

Complainant,

versus

J. S. WOODS.

To Honorable Allen Cox, United States District Judge:

Comes Interstate Realty Company, a corporation, by leave of Court first obtained, and files this Second Amended Complaint against J. S. Woods and shows unto the Court as follows:

Count No. 1.

1.

Complainant is a corporation organized and existing under and by virtue of the laws of the State of Tennessee and having its domicile and principal place of business in Memphis, Shelby County, Tennessee. Complainant is engaged in the business of concluding sales of real estate and has been so engaged for a number of years.

2.

Defendant J. S. Woods is a resident citizen of the First Court District of Panola County, Mississippi, in the Western Division of the Northern District of Mississippi.

3.

Complainant and Defendant are citizens and residents of different States and there is involved in this suit more than Three Thousand Dollars ($3,000.00) exclusive of interest and costs.

4.

This is a suit for a real estate brokers' commission and involves the following land situated in the Second Court District of Panola County, Mississippi in the Western Division of the Northern District of Mississippi, and described as follows:

A fraction of the Southeast Quarter (SE) South of Tallahatchie River of Section Twenty-three (23) Township Eight (8), Range Seven (7), 50 acres more or less; a fraction of the Southwest Quarter (SW¼) and a fraction of the Northwest Quarter (NW¼) and a fraction of the Southeast Quarter (SE¼) of Section Twenty-four (24), Township Eight (8), Range Seven (7), 228 acres, more or less; the North One-half (N½) of the Southwest Quarter (SW¼) of Section Twenty-five (25), Township Eight (8), Range Seven (7), 480 acres, more or less; a fraction of the East One-half (E½) of Section Twenty-six (26) Township Eight (8), Range Seven (7), 120 acres, more or less; being all located in the Second Court District of Panola County, Mississippi.

5.

During the years of 1944 and 1945 Defendant J. S. Woods was the owner of the land described in paragraph No. 4 above.

6.

During the year of 1944 Complainant, through its agent Charles W. Partee, worked on the sale of the property of Defendant above described, went to a good deal of expense advertising said property and to a great deal of traveling expense showing said property to prospective buyers. This was done with the knowledge of Defendant and with his consent and cooperation. Defendant knew and thoroughly understood that Complainant was to receive a commission of Five per cent of the total amount of the sale price of the property above described.

7.

Later one L. A. Conolly and United Service and Research, Inc., had listed with them by Defendant the property above described and L. A. Conolly and United Service and Research, Inc., spent a great deal of time and money advertising said property and showing it to prospective buyers. This was done with the knowledge of Defendant and with his consent and cooperation. Defendant knew and understood that during said time, L. A. Conolly and United Service and Research, Inc., were to receive a commission of five per cent of the total sale price of said property if they succeeded in finding a buyer for said property at the price and on the terms set out in the agreement between them and Defendant.

8.

When the sole agency held by United Service and Research, Inc., for the sale of said property expired in 1945 Defendant called Charles W. Partee, the agent of Complainant, over the telephone and advised him, Partee, that he, Partee, could again get busy and sell the above de-

scribed property. Partee, as the agent of Complainant immediately began advertising said property and working to find a buyer for said property. After Partee, as the agent of Complainant, had worked on the sale of said property for several weeks the above named L. A. Conolly notified Partee that he, Conolly, had a prospective buyer for the property above described, such prospective buyer being one Carl A. McCown. In fact said Carl A. McCown signed a Contract with United Service and Research, Inc., of which the said L. A. Conolly was the agent. A copy of said Contract is hereto attached as Exhibit No. 1 to this Second Amended Complaint and is hereby made a part of same as much as if set out in full herein.

9.

The said Charles W. Partee had been previously employed by Complainant on a general agreement for his full time services, under which agreement Complainant was to receive a certain definite per cent of the commission earned on all sales concluded as the result of the agency of said Charles W. Partee, the said Charles W. Partee, as agent, to receive the balance of such commission. In this particular instance and for this particular transaction it was agreed that Complainant, under the Contract which he had with Defendant, would receive twenty per cent of the commission of said sale if concluded and would pay to said Charles W. Partee thirty per cent of said commission; would pay to said L. A. Conolly twenty-five per cent of said commission; and would pay to said United Service and Research, Inc., twenty-five per cent of said commission.

10.

On November 3, 1945, Defendant entered into a Contract with Complainant at Memphis, Tennessee, for the

sale of the property above described at a price of Sixty-nine Thousand Dollars ($69,000.00). Of this amount Five Thousand Dollars ($5,000.00) was to be paid in cash as earnest money and in part payment; Fourteen Thousand Dollars ($14,000.00) was to be paid in cash at the closing of the sale; Fifty Thousand Dollars ($50,000.00) was to be paid in the following amounts: Four Thousand Dollars ($4,000.00) on or before the date of the Deed from Defendants to said Carl A. McCown; Four Thousand Dollars ($4,000.00) on or before two years from the date of said Deed and fourteen annual payments of Three Thousand Dollars ($3,000.00) each, the first of said last mentioned payments to be due on or before three years from the date of said Deed and one of said payments to be due each year thereafter until all were paid. All of said payments were to bear interest at the rate of four per cent per annum. By the terms of said Contract Defendant was to pay Complainant a commission of Five per cent of the total purchase price of said property or the amount of Three Thousand Four Hundred and Fifty Dollars ($3,450.00). A copy of said contract is hereto attached as Exhibit No. 2 to this Second Amended Complaint and is hereby made a part of same as much as if set out in full herein. This is the Contract for the breach of which the action in this Count is based.

11.

Prior to the execution of this written Contract and up to November 20, 1945, Complainant, through its agents continued to work on the sale to said Carl A. McCown in the attempt to carry out the Contract which has been made Exhibit No. 2 hereto and went to considerable expense and spent considerable time in their efforts. In the attempt to conclude the sale Complainant, through its agents above named, offered to Defendant the farm

of Carl A. McCown as security for Nine Thousand Dollars ($9,000.00) of the cash payment demanded by Defendant. All other terms of the proposed trade were the same as set out in the Contract which has been made Exhibit No. 2 hereto. This last Contract was to expire on November 20, 1945. Thereupon Complainant, through its agents above named, asked Defendant to give them four or five more days after November 20, 1945, to enable McCown, their prospective buyer, to raise the additional Nine Thousand Dollars ($9,000.00) in cash necessary to close the sale of the above described property of Defendant on the terms above set out. Defendant refused to grant this additional time and stated that he was unwilling to deal any further with said McCown. This was in spite of the fact that Complainant, through its agents as above set out, had furnished Defendant with a buyer ready, willing and able to buy on terms satisfactory to Defendant.

12.

On November 27, 1945, just seven days after the date of the expiration of the Contract sued on in this Count, Defendant and McCown closed a Contract for the sale of the above described property of Defendant. A copy of this agreement is hereto attached as Exhibit No. 3 to this Second Amended Complaint and is hereby made a part of same as much as if set out in full herein.

13.

On January 1, 1946, Defendant conveyed by Warranty Deed the property herein involved to said Carl A. McCown. The consideration for this Deed was a total sale price of Sixty-seven Thousand Two Hundred and Seventy-five Dollars ($67,275.00); a cash payment of Thirteen

Thousand Two Hundred and Seventy-five Dollars ($13,275.00); the balance of Fifty-four Thousand Dollars ($54,000.00) with four per cent interest per annum from January 1, 1946, being evidenced by note of Two Thousand Five Hundred Dollars ($2,500.00) due on or before January 1, 1947; note of Two Thousand Five Hundred Dollars ($2,500.00) due on or before January 1, 1948, eleven notes of Four Thousand Dollars ($4,000.00) each, one of said notes being due on or before January 1st of each year, beginning January 1, 1949, and one note of Five Thousand Dollars ($5,000.00) due on January 1, 1960. Possession of the property herein involved was to be given to said McCown January 1, 1946. Defendant was to pay the 1945 taxes on said property and to receive the crop on said land for the year 1945. The deferred payments were secured by a vendor's lien and by Purchase Money Deed of Trust. A copy of said Deed is hereto attached as Exhibit No. 4 to this Second Amended Complant and is hereby made a part of same as much as if set out in full herein.

14.

In further consummation of said trade, on January 1, 1946, said Carl A. McCown and his wife Louise McCown, gave their certain Deed of Trust to John W. Kyle, Trustee for Defendant. A copy of said Deed of Trust is hereto attached as Exhibit No. 5 to this Second Amended Complaint and is hereby made a part of same as much as if set out in full herein.

15.

In addition to the above, on January 1, 1946, the said Carl A. McCown executed and delivered to John W. Kyle, Trustee for Defendant, an additional Deed of Trust for

the payment of certain of the deferred payments due under the above mentioned Deed. A copy of this Deed of Trust is hereto attached as Exhibit No. 6 and is hereby made a part of this Second Amended Complaint as much as if set out in full herein.

16.

The sale of said land from Defendants to said Carl A. McCown was made solely because of the services rendered by Complainant, through its above named agents, and such services were rendered with the full knowledge of Defendant and with his consent.

17.

Although requested so to do, Defendant has refused to pay to Complainant said commission of Three Thousand Four Hundred and Fifty Dollars ($3,450.00) or any part thereof.

18.

Defendant is indebted to Complainant for the payment of said commission of Three Thousand Four Hundred Fifty Dollars ($3,450.00) together with six per cent interest thereon from November 27, 1945, until paid.

19.

Wherefore Complainant demands Judgment of Defendant for said sum of Three Thousand Four Hundred and Fifty Dollars ($3,450.00) with six per cent interest thereon from November 26, 1945, until paid. Complainant also asks for a jury for the trial of this suit.

Count No. 2.

1.

Complainant is a corporation organized and existing under and by virtue of the laws of the State of Tennessee and having its domicile and principal place of business in Memphis, Shelby County, Tennessee. Complainant is engaged in the business of concluding sales of real estate and has been so engaged for a number of years.

2.

Defendant J. S. Woods is a resident citizen of the First Court District of Panola County, Mississippi, in the Western Division of the Northern District of Mississippi.

3.

Complainant and Defendant are citizens and residents of different States and there is involved in this suit more than Three Thousand Dollars ($3,000.00), exclusive of interest and costs.

4.

This is a suit for a real estate brokers' commission and involves the following land situated in the Second Court District of Panola County, Mississippi in the Western Division of the Northern District of Mississippi, and described as follows:

A fraction of the Southeast Quarter (SE¼) South of Tallahatchie River of Section Twenty-three (23) Township Eight (8), Range Seven (7), 50 acres more or less; a fraction of the Southwest Quarter (SW¼) and a frac-

tion of the Northwest Quarter ($NW^1/_4$) and a fraction of the Southeast Quarter ($SE^1/_4$) of Section Twenty-four (24), Township Eight (8), Range Seven (7), 228 acres, more or less; the North One-half ($N^1/_2$) of the Southwest Quarter ($SW^1/_4$) of Section Twenty-five (25), Township Eight (8), Range Seven (7), 480 acres, more or less; a fraction of the East One-half ($E^1/_2$) of Section Twenty-six (26), Township Eight (8), Range Seven (7), 120 acres, more or less; being all located in the Second Court District of Panola County, Mississippi.

5.

During the years of 1944 and 1945 Defendant J. S. Woods was the owner of the land described in paragraph No. 4 above.

6.

During the year of 1944 Complainant, through its agent Charles W. Partee, worked on the sale of the property of Defendant above described, went to a good deal of expense advertising said property and to a great deal of traveling expense showing said property to prospective buyers. This was done with the knowledge of Defendant and with his consent and cooperation. Defendant knew and thoroughly understood that it was usual and customary for a real estate broker under such circumstances to receive a commission of five per cent of the total sale price of the real estate sold.

7.

Later one L. A. Conolly and United Service and Research, Inc., had listed with them by Defendant the property above described and L. A. Conolly and United Serv-

ice and Research, Inc., spent a great deal of time and money advertising said property and showing it to prospective buyers. This was done with the knowledge of Defendant and with his consent and cooperation. Defendant knew and thoroughly understood that it was usual and customary for a real estate broker under such circumstances to receive a commission of five per cent of the total sale price of the real estate sold.

8.

When the sole agency held by United Service and Research, Inc., for the sale of said property expired in 1945 Defendant called Charles W. Partee, the agent of Complainant, over the telephone and advised him, Partee, that he, Partee, could again get busy to sell the above described property. Partee, as the agent of Complainant immediately began advertising said property and working to find a buyer for said property. After Partee, as the agent of Complainant, had worked on the sale of said property for several weeks the above named L. A. Conolly notified Partee that he, Conolly, had a prospective buyer for the property above described, such prospective buyer being one Carl A. McCown. In fact said Carl A. McCown signed a Contract with United Service and Research, Inc., of which the said L. A. Conolly was the agent. A copy of said Contract has already been made Exhibit No. 1 to this Second Amended Complaint and is hereby made an exhibit to this Count by reference as much as if set out in full herein.

9.

The said Charles W. Partee had been previously employed by Complainant on a general agreement for his full time services, under which agreement Complainant

was to receive a certain definite per cent of the commission earned on all sales concluded as the result of the agency of said Charles W. Partee, the said Charles W. Partee, as agent, to receive the balance of such commission. In this particular instance and for this particular transaction it was agreed that Complainant, under the Contract which it had with Defendant, would receive twenty per cent of the commission on said sale if concluded and would pay to said Charles W. Partee thirty per cent of said commission; would pay to said L. A. Conolly twenty-five per cent of said commission; and would pay to said United Service and Research, Inc., twenty-five per cent of said commission.

10.

On November 3, 1945, Defendant entered into a Contract with Complainant at Memphis, Tennessee, for the sale of the property above described at a price of Sixty-nine Thousand Dollars ($69,000.00). Of this amount Five Thousand Dollars ($5,000.00) was to be paid in cash as earnest money and in part payment; Fourteen Thousand Dollars ($14,000.00) was to be paid in cash at the closing of the sale; Fifty Thousand Dollars ($50,000.00) was to be paid in the following amounts: Four Thousand Dollarc ($4,000.00) on or before the date of the Deed from Defendant to said Carl A. McCown; Four Thousand Dollars ($4,000.00) on or before two years from the date of said Deed and fourteen annual payments of Three Thousand Dollars ($3,000.00) each, the first of said last mentioned payments to be due on or before three years from the date of said Deed and one of said payments to be due each year thereafter until all were paid. All of said payments were to bear interest at the rate of four per cent per annum. By the terms of said Contract Defendant was to pay Complainant a commission of Five per cent of the

total purchase price of said property or the amount of Three Thousand Four Hundred and Fifty Dollars ($3,450.00). A copy of said Contract has already been made Exhibit No. 2 to this Second Amended Complaint and is hereby made an Exhibit to this Count by reference as much as if set out in full herein.

11.

Prior to the execution of this written Contract and up to November 20, 1945, Complainant, through its agents continued to work on the sale to said Carl A. McCown in the attempt to carry out the Contract which has been made Exhibit No. 2 hereto and went to considerable expense and spent considerable time in their efforts. In the attempt to conclude the sale Complainant, through its agents above named, offered to Defendant the farm of Carl A. McCown as security for Nine Thousand Dollars ($9,000.00) of the cash payment demanded by Defendant. All other terms of the proposed trade were the same as set out in the Contract which has been made Exhibit No. 2 hereto. This last Contract was to expire on November 20, 1945. Thereupon Complainant, through its agents above named, asked Defendant to give them four or five more days after November 20, 1945, to enable McCown, their prospective buyers, to raise the additional Nine Thousand Dollars ($9,000.00) in cash necessary to close the sale of the above described property of Defendant on the terms above set out. Defendant refused to grant this additional time and stated that he was unwilling to deal any further with said McCown. This was in spite of the fact that Complainant, through its agents as above set out, had furnished Defendant with a buyer ready, willing and able to buy on terms satisfactory to Defendant.

12.

On November 27, 1945, just seven days after the date of the expiration of the Contract sued on in this Count, Defendant and McCown closed a Contract for the sale of the above described property of Defendant. A copy of this Agreement has already been made Exhibit No. 3 to this Second Amended Complaint and is hereby made an Exhibit to this Count by reference as much as if set out in full herein.

13.

On January 1, 1946, Defendant conveyed by Warranty Deed the property herein involved to said Carl A. McCown. The consideration for this Deed was a total sale price of Sixty-seven Thousand Two Hundred and Seventy-five Dollars ($67,275.00); a cash payment of Thirteen Thousand Two Hundred and Seventy-five Dollars ($13,275.00); the balance of Fifty-four Thousand Dollars ($54,000.00) with four per cent interest per annum from January 1, 1946, being evidenced by note of Two Thousand Five Hundred Dollars ($2,500.00) due on or before January 1, 1947; note of Two Thousand Five Hundred Dollars ($2,500.00) due on or before January 1, 1948, eleven notes of Four Thousand Dollars ($4,000.00) each, one of said notes being due on or before January 1st of each year, beginning January 1, 1949, and one note of Five Thousand Dollars ($5,000.00) due on January 1, 1960. Possession of the property herein involved was to be given to said McCown January 1, 1946. Defendant was to pay the 1945 taxes on said property and to receive the crop on said land for the year 1945. The deferred payments were secured by a vendor's lien and by Purchase Money Deed of Trust. A copy of said Deed has already been made Exhibit No. 4 to this Second Amended Complaint

and is hereby made an Exhibit to this Count by reference as much as if set out in full herein.

14.

In further consummation of said trade, on January 1, 1946, said Carl A. McCown and his wife Louise McCown, gave their certain Deed of Trust to John W. Kyle, Trustee for Defendant. A copy of said Deed of Trust has already been made Exhibit No. 5 to this Second Amended Complaint and is hereby made an Exhibit to this Count by reference as much as if set out in full herein.

15.

In addition to the above, on January 1, 1946, said Carl A. McCown executed and delivered to John W. Kyle, Trustee for Defendant, an additional Deed of Trust for the payment of certain of the deferred payments due under the above mentioned Deed. A copy of this Deed of Trust has already been made Exhibit No. 6 to this Second Amended Complaint and is hereby made an Exhibit to this Count by reference as much as if set out in full herein.

16.

The sale of said land from Defendant to said Carl A. McCown was made solely because of the services rendered by Complainant, through its above named agents, and such services were rendered with the full knowledge of Defendant and with his consent. The reasonable value of the services performed by Complainant, through its agents, in the sale of said land was Three Thousand Four Hundred and Fifty Dollars ($3,450.00).

17.

Although requested so to do, Defendant has refused to pay to Complainant said commission of Three Thousand Four Hundred and Fifty Dollars ($3,450.00) or any part thereof.

18.

Defendant is indebted to Complainant for the payment of said commission of Three Thousand Four Hundred and Fifty Dollars ($3,450.00) together with six per cent interest thereon from November 27, 1945, until paid.

19.

Wherefore Complainant demands Judgment of Defendant for said sum of Three Thousand Four Hundred and Fifty Dollars ($3,450.00) with six per cent interest thereon from November 26, 1945, until paid. Complainant also asks for a jury for the trial of this suit.

(Signed) L. C. ANDREWS,
(L. C. Andrews)

Oxford, Mississippi.

JAMES STONE & SONS,
(Signed) By PHIL STONE,
(Phil Stone)
Attorneys for Complainant.

Oxford, Mississippi.

14 CERTIFICATE.

I, Phil Stone, of the firm of James Stone & Sons, of counsel for Complainant, do hereby certify that I have this day mailed, postage prepaid, a true copy of the foregoing Second Amended Complaint to McClure & Fant and to John W. Kyle, Attorneys for Defendant, at their usual post office addresses at Sardis, Mississipi.

This October 27, 1947.

(Signed) PHIL STONE,
(Phil Stone)
Of Counsel for Complainant.

Oxford, Mississippi.

EXHIBIT No. 1 TO SECOND AMENDED COMPLAINT.

United Service and Research, Inc.,
Realtors 81 Madison Bldg.,
Memphis, Tenn.

Memphis, Tenn., November 1st, 1945.

Received of Carl A. McCown the sum of Two Thousand Dollars as earnest money and in part payment of the following described real estate, situated in Panola County, Mississippi together with all improvements and appurtenances thereon, to-wit:

Being all the land now owned by the seller in section 23, 24, 25 and 26 Township 3 S. Range 7 W. or in any adjoining section. All tools, implements, and equipment as per list attached. Also 1 truck, 1 John Deere Tractor together with all tractor equipment. 1 Letz Mill and attachments. Also 3000 lbs. cotton seed.

which we have this day sold and agree to convey to Carl A. McCown or his order and which he agrees to purchase for the sum of Exchange of property upon the term and conditions as follows:

Purchaser to convey 200 acres of land located in Panola County and described as follows: Section 32 T-8 Range 7.

Cash of $2,000.00 and 20 notes of $2,100.00 each due and payable on January 1st, 1947, to and including January 1st, 1967 with interest at 4% per annum. Interest payable annually on Entire unpaid balance. Notes payable on or before. Notes to be secured with Deed of Trust on above described land.

Both Purchaser and Seller to retain this year's crops. Both Purchaser and Seller to pay 1945 taxes on their respective properties. Possession to be given on each property on or before January 1st, 1945.

Deferred payments to be evidenced by notes and secured by a Truste Deed Mortgage on the premises. Settlement and payment of balance of said cash payment to be paid upon presentation of a good and valid warranty deed with the usual covenants and conveying a good and merchantable title, after allowing 10 days from delivery of abstracts for the examination of title. Seller agree to furnish promptly necessary abstracts of title, for examination only. It is hereby agreed by both parties that in the event of a controversy regarding title a Guarantee Policy issued by Commerce Title Guaranty Co. or the Union Planters Title Guaranty Co. for the purchase price herein stipulated covering this property shall constitute and be accepted by purchaser as conclusive evidence of a good and merchantable title.

Possession is to be given on or before January 1st, 1945. This contract is subject to a none lease expiring ..... and subject to the rights of tenants. Rents and expenses are to be prorated as of closing date. Insurance to be prorated as of closing date. Taxes for the current year to be paid by seller. The seller agrees to pay any prior unpaid taxes or liens, including front foot assessment, on the property he convey. The improvements on this land are to be delivered in as good condition as they are of the date of this contract, ordinary wear and tear excepted; and if not in such condition when final delivery is offered, the seller is obligated to put them in such condition.

It is understood and agreed that if the title is not good and can not be made good within a reasonable time after written notice is given to seller that title is defective, specifically pointing out the defects, then this earnest money, which has been deposited with the undersigned agent, is to be returned to the purchaser and the usual commission is to be paid the agent by the seller. If the title is good and the property is not paid for as herein specified, this earnest money is to be forfeited, and the undersigned agent is authorized to deduct therefrom its commission, the surplus, if any, to be paid to the seller. It is expressly understood and agreed, however, by both parties hereto that such forfeiture shall in no way affect the right of either party to enforce the specific performance of this contract. The seller agrees to pay to the undersigned agent the usual commission as established by the Real Estate Board of Memphis.

It is agreed that the above described property is sold subject to restrictions of record and existing easements, if any.

It is expressly understood and agreed between the parties hereto that this contract as signed by them constitutes the sole and entire agreement by them, and no modification of this contract shall be binding upon either party, unless in writing; signed by them, and attached hereto; and no representation, statement, or inducement, except as herein noted, shall be binding upon either party or agent.

Witness the signature of all parties the day and year above written.

We acknowledge receipt of the above mentioned earnest money and hold same subject to the terms of this contract.

(Signature torn off.)

.....

Agents.

.....

Executed in .....

EXHIBIT No. 2 TO SECOND AMENDED COMPLAINT.

17

Executed in Triplicate.

Phones 6-5234, 6-5225.

Interstate Realty Company,
107 Madison Ave., at Main Street,
Memphis, Tenn.

Contract for Sale of Real Estate.

Memphis, Tenn., November 3, 1945.

Received of The Undersigned Purchaser the sum of Five Thousand & No/100 ($5000.00) Dollars as earnest

money and in part payment for the following described lands, with all improvements thereon, situate in the County of Panola and State of Mississippi, to-wit:

Plantation property, known as the J. S. Woods place, on old Highway 51, approximately 3½ miles east of the town of Batesville on the road to Sardis Lake and bounded on the north by Tallahatchie River, and containing, according to Deed, approximately 901 acres, more or less, together with all improvements thereon; and also the following personal property:

1 Power Hay Baler
2 Horse drawn mowing machines
1 Hay Rake (horse drawn)
1 4-Mule Disc
3 Vulcan new ground plows
2 Heavy new ground harrows
2 Heavy section harrows
4 2-Horse break plows
1 Tractor stalk cutter
2 Horse drawn stalk cutters
3 Middle busters
12 1-Horse top harrows
7 Combination planters (corn & cotton)
45 Cultivaters (one horse)
5 Fertilizer distributors
42 One-horse turn plows
42 Coldwater iron shovel stocks
9 Double Shovels
75 Cotton hoes
4 2-Horse wagons
42 Sets plow gear
2 Sets wagon harness
1 Blacksmith shop, complete with tools
1 Outfit for putting down wells

1 Spray barrel & pump
2 Saddle gun boll weevil & worm spray outfits
Fertilizer forks, corn scoops, saw, wedges and axes
1 Farm saddle & bridle
3 Road slips
1 Road drag
1 Martin ditching machine
1 John Deere tractor, with all tractor equipment belonging to same
1 Letz feed mill, with all attachments belonging to same

which I have this day sold and agreed to convey by warranty deed to The Undersigned Purchaser or any other designated grantee, for the total price of Sixty-Nine Thousand & No/100 Dollars ($69,000.00) upon terms as follows:

$19,000.00 cash on delivery of good and sufficient Warranty Deed; the balance of said purchase price, amounting to $50,000.00 is to be payable $4,000.00 on or before one year from date of Deed, $4,000.00 on or before two years from date of Deed, and the remaining part of said purchase price, amounting to $42,000.00, is to be payable in 14 annual payments of $3,000.00 each, the first of said payments being due on or before three years from date of Deed, and one of said payments each year thereafter until all are paid. All of said deferred payments are to be payable on or before maturity and are to draw interest at four per cent (4%) per annum, the interest payable annually.

Possession of said property to be given on or before January 1, 1946, the seller retaining the income from said property for the year 1945 and paying the taxes for the year 1945.

This contract is signed by the seller conditioned on the Interstate Realty Company, Agent in this transaction, securing a purchaser to execute this contract under the terms set out herein on or before November 20, 1945, after date.

Cash payment to be made upon presentation of good and sufficient warranty deed. Deferred payments to be evidenced by promissory notes, dated ....., and secured by purchase money mortgage deed of trust.

The vendor agrees to furnish complete abstract of title to said property; and the purchaser is allowed the period of 30 days from the delivery of such abstract for the examination of title. If the title is not good, and cannot be made good within 90 days after written notice specifying defects of title, then said earnest money is to be returned to the purchaser. But, if the purchaser defaults in the performance hereof on his part, then said earnest money is to be retained by Interstate Realty Company for the vendor and for application to the payment of its compensation for negotiating this contract. But such forfeiture shall in no wise affect the right of either party to enforce the specific performance of this agreement. Both parties hereto agree that the signing and delivery of this writing constitutes a sale, the purchaser having examined said property, and relying upon his own estimate of the value thereof, and the vendor accepting the purchaser, and agreeing to pay to Interstate Realty Company the compensation hereinafter specified for negotiating this contract. The validity of this contract is in no wise dependent upon the signature or agreement of any party not named herein.

Interstate Realty Company executes this contract solely in its capacity as agent, and may relieve itself from

liability hereunder by disclosing the name of its principal.

.....

Agent.

.....

Purchaser.

I agree to sell the afore-described real estate at the price and upon the terms hereinabove set forth, ratifying and confirming the foregoing contract, for the negotiation of which I agree to pay Interstate Realty Company the sum of $ 5% of purchase price, on the date when said contract in the usual course should be consummated, until which time the earnest money is to be retained by said Interstate Realty Company.

J. S. WOODS,
Vendor.

EXHIBIT No. 3 TO SECOND AMENDED COMPLANIT.

20 Agreement for Sale of Land.

This Agreement, Made and entered into this the 27th day of November, 1945, by and between J. S. Woods. hereinafter called the Vendor, and Carl A. McCown, hereinafter called the Purchaser, Witnesseth:

1. The said vendor hereby agrees to sell and convey to the said purchaser the farm lands known as the Potts Place, containing approximately 900 acres, now owned by the said vendor, and situated about 1½ miles southwest of Belmont Bridge, in the Second Court District of Panola County, Mississippi, for the sum of $67,275.00, of which the sum of $17,275.00 is to be paid in cash by said purchaser to said Vendor upon the delivery of a proper

deed of conveyance of said lands to said purchaser, and the balance is to be paid in fourteen annual installments in amounts and with maturities as follows, to-wit:

The sum of $2,500.00 is to become due and payable on January 1, 1947; and the sum of $2,500.00 is to become due and payable on January 1, 1948. And the sum of $3,750.00 is to become due and payable on the First Day of January of each of the years 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, and 1960.

Said deferred payments are to be evidenced by fourteen purchase money notes in amounts and with maturities as stated above; and all of said notes are to bear interest from January 1, 1946, until paid, at the rate of four per cent (4%) per annum, interest payable annually, on the First Day of January of each year; and all of said notes are to be secured by a vendor's lien and a first mortgage deed of trust on said land, in the usual form, with power of sale; and all of said notes shall provide for accelleration of payment of the principal thereof, at the option of the holder, if default be made in the payment of any of said notes, or any interest thereon, when due.

2. The said purchaser agrees to purchase the above described lands for the price hereinabove stated, and to pay to the said vendor the said sum of $17,275.00 in cash, upon the delivery to said purchaser of a proper deed of conveyance of said lands by the said vendor, and to execute and deliver to the said vendor at the same time the purchase money notes for the remaining $50,000.00 of said purchase price, in amounts and with maturities as stated above, and to execute and deliver to said vendor at the same time a mortgage deed of trust, with power of sale, in the usual form, to secure the payment of said unpaid balance of said purchase price, evidenced by said install-

ment notes. And it is expressly stipulated and agreed that Mrs. Louise McCown, the wife of said Carl McCown, shall join in the execution of said mortgage deed of trust. The notes evidencing the unpaid balance of said purchase price shall bear interest from January 1, 1946, until paid, at the rate of four per cent (4%) per annum, interest payable annually on the First Day of January of each year, as aforesaid; and all of said notes to provide for acceleration of payment of the principal thereof, at the option of the holder, if default be made in the payment of any of said notes, or any interest thereon, when due; and said notes shall provide for the payment of an attorney's fee, if placed in the hands of an attorney for collection after maturity.

3. The said vendor agrees to prepare, or to have prepared at his own expense, a proper deed of conveyance of said lands, conveying said lands to said purchaser, in fee simple, free and clear of all encumbrances, on January 1, 1946; and in said deed of conveyance the said vendor shall warrant the title to said lands to said purchaser, except as to taxes levied and assessed against said lands for the year 1946 and all succeeding years. The said purchaser shall pay the taxes levied and assessed against said lands for the year 1946. And said purchaser shall be entitled to possession of said lands from and after January 1, 1946.

4. The said purchaser has paid to the said vendor on the date of the signing of this Agreement the sum of $5,000.00 as earnest money to insure the prompt performance of this Agreement by said purchaser. And the said purchaser agrees to pay the remaining $12,275.00 of the cash payment to be made by said purchaser to said vendor on January 1, 1946, when the deed of conveyance is to be delivered to him by said vendor. In the event the

said purchaser shall promptly perform his contract to purchase said lands for the price and upon the terms hereinabove stated, said $5,000.00 earnest money shall be treated as a part payment of $17,275.00 cash payment to be made by the said purchaser under the terms of this Agreement. If, on the other hand, said purchaser fails to perform properly his contract and agreement to purchase said lands, as provided for in this Agreement, the said $5,000.00, thus paid as earnest money, shall be retained by the said vendor as liquidated damages for failure to carry out this Agreement on the part of said purchaser.

5. And for the consideration above stated the vendor agrees to sell and deliver to the said purchaser the following personal property now located on said lands and used in connection with the farming operations on said lands, viz.:

1 Power hay baler
2 mowing machines
1 hay rake
1 4-mule disc
3 Vulcan new ground plows
2 New ground harrows
2 Section harrows
4 2-horse break plows
1 tractor stalk cutter
2 Horse-drawn cutters
3 Middle-busters
12 Top harrows
7 Combination planters
45 Cultivators (1 horse)
5 Fertilizer distributors
42 1-horse turning plows
42 Iron shovel stocks

9 Double shovels
75 hoes
4 Wagons
42 Plow gear
2 Sets of wagon harness
1 Black-smith shop, complete
1 Outfit for putting down wells
1 Spray barrel and pump
2 Saddle gun spray outfits for weevil
Fertilizer forks, corn scoops, saw wedges and axes
1 Saddle and bridle
3 Road slips
1 Road drag
1 Martin ditching machine
1 Letz feed mill
1 2-row corn planter
1 John Deere tractor and equipment, consisting of tractor, middle-buster, disc and cultivating attachments.

The said purchaser agrees to execute and deliver to the said vendor a chattel mortgage deed of trust on the above described farm implements, machinery and equipment as additional security for the payment of the first $2,500.00 purchase money note becoming due January 1, 1947.

6. The said vendor agrees to sell to the said purchaser at such prices as may be agreed upon by said parties 25 or 30 mules now owned by said vendor; or, if said parties are unable to agree upon the price of said mules, the vendor agrees to lend to said purchaser a sufficient sum of money to enable said purchaser to purchase 25 or 30 head of mules elsewhere; provided, however that the amount of such loan shall not exceed $150.00 for each such mule purchased. The purchase price of said mules, or the money advanced by the vendor to enable the pur-

chaser to purchase said mules elsewhere, shall be evidenced by the promissory note of the purchaser, payable to the vendor, and becoming due and payable December 1, 1946, with interest thereon from the 1st day of January, 1946, until paid, at the rate of four per cent (4%) per annum, and shall be secured by a chattel mortgage deed of trust on said mules and all crops grown on the above described lands during the year 1946, and the above described farming implements, machinery and equipment.

7. The said vendor agrees to advance to said purchaser during the 1946 crop season the sum of $3,000.00, to be used by said purchaser to defray the expenses of planting, cultivating and gathering crops on the above described lands during the year 1946, and in making advancements to the share-croppers and other agricultural workers on said lands during the 1946 crop season to enable them to subsist and to plant, cultivate and gather their said crops. The said sum of $3,000.00 shall be advanced to the said purchaser in approximately equal monthly installments beginning March 1st, 1946; and the advancements thus made shall be evidenced by notes bearing interest from date until paid at the rate of six per cent (6%) per annum; and said indebtedness shall become due and payable on or before December 1, 1946; and the prompt payment of said indebtedness shall be secured by a mortgage deed of trust, which shall constitute a first lien, upon the crops to be grown on the above described lands during the year 1946, and by a mortgage deed of trust on the mules and the above described farming implements, machinery and equipment.

8. The said purchaser agrees to execute all necessary instruments required to carry out the provisions of paragraphs 5, 6 and 7 of the Agreement.

Witness our signature, this the 27th day of November, 1945.

(Signed) J. S. WOODS,
Vendor.
(Signed) CARL A. McCOWN,
Purchaser.

State of Mississippi,
Panola County.

Before me, the undersigned Notary Public in and for Panola County, in the State of Mississippi, duly commissioned, qualified and acting, this day personally appeared the above named J. S. Woods, who acknowledged that he signed and delivered the foregoing instrument on the day and year therein mentioned as his voluntary and deed and for the purposes and consideration therein stated.

Given under my hand and seal of office at Sardis, Mississippi, this the 27th day of November, 1945.

(Signed) ANNA MAYE GILLESPIE,
(Seal) Notary Public.

My Commission expires Feb. 2nd, 1948.

State of Mississippi,
Panola County.

Before me, the undersigned Notary Public in and for Panola County, in the State of Mississippi, duly commissioned, qualified and acting, this day personally appeared the above named Carl A. McCown, who acknowledged that he signed and delivered the foregoing instrument on the day and year therein mentioned as his voluntary act and deed and for the purposes and consideration therein stated.

Given under my hand and seal of office at Sardis, Mississipi, this the 27th day of November, 1945.

(Signed) ANNA MAYE GILLESPIE,
(Seal) Notary Public.

My Commission expires Feb. 2nd, 1948.

EXHIBIT No. 4 TO SECOND AMENDED COMPLAINT.

26 Deed of Conveyance.

J. S. Woods
to
Carl A. McCown.

State of Mississippi,
Panola County.

In Consideration of the sum of Sixty-Seven Thousand, Two Hundred and Seventy-Five Dollars ($67,275.00), of which the sum of $13,275.00 has been paid to me in cash by Carl A. McCown, the grantee herein, the receipt of which is hereby acknowledged, and the balance, namely, the sum of $54,000.00, is to be paid in fourteen annual installments in amounts and with dates of maturity as follows: The sum of $2,500.00 is to become due and payable on the First Day of January of each of the years 1947 and 1948, and the sum of $4,000.00 is to become due and payable on the First day of January of each of the years 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, and 1959, and the sum of $5,000.00 is to become due and payable on the First Day of January, 1960 —said unpaid balance of said purchase price being evidenced by fourteen promissory notes of even date herewith, in amounts and with dates of maturity as stated above, signed by the said Carl A. McCown, as maker, and

payable to the undersigned J. S. Woods, or his order, and all of said notes bearing interest from date until paid at the rate of four per cent (4%) per annum, interst payable annually on the First Day of January of each year, and being secured by a first mortgage deed of trust of even date herewith on the lands thereinafter described, I, J. S. Woods, do by these presents grant, bargain and seil, convey and warrant unto the said Carl A. McCown the following described lands, lying and being situated in the Second Court District of Panola County, in the State of Mississippi, to-wit:

The Northeast Quarter of Section Twenty-Five (25), Township Eight (8), Range Seven (7) West; and

Also, fifty-one (51) acres of land off of the Northwest Quarter of said Section Twenty-Five (25), having the following metes and bounds: Beginning eleven (11) chains North of the Southeast Corner of the said Northwest Quarter; thence North 72 degrees 55 minutes West, thirteen (13) chains and sixty (60) links; thence North 26 degrees 30 minutes West, nine (9) chains; thence North 8 degrees 30 minutes West, fourteen (14) chains; thence West eleven (11) chains and thirty-five (35) links; thence North three (3) chains and fifty (50) links to section line between Sections Twenty-Four (24) and Twenty-Five (25); thence East thirty (30) chains and fifty (50) links to Northeast Corner of said Northwest Quarter; thence South twenty-nine (29) chains to beginning.

Also, thirty (30) acres, more or less, in the Southeast Quarter of Section Twenty-Four (24), Township Eight (8), Range Seven (7) West, being all of said quarter section South of Hotophia Creek; and

Also, all of the West Half of said Section Twenty-Four (24) South of Tallahatchie River and West of Hotophia

Creek, except thirty-nine (39) acres off of the West side thereof, which said thirty-nine (39) acres is described as: Beginning at the South-West corner of said Section Twenty-Four (24); thence East nine (9) chains and fifty (50) links; thence North to said Tallhatchie River; thence with the meanderings of said River to the Section line between Sections Twenty-three (23) and Twenty-Four (24); thence South with the said Section line to beginning—the part of said West Half of said Section herein conveyed containing one hundred and seventy-one (171) acres, more or less.

Also; the Southwest Quarter of Section Twenty-Five (25), Township Eight (8), Range Seven (7) West; and

Also, one hundred and nine (109) acres of land, more or less, in the Northwest Quarter of said Section Twenty-Five (25), having the following metes and bounds: Beginning at the Southeast Corner of said Quarter Section; thence North eleven (11) chains; thence North 72 degrees 55 minutes West thirteen (13) chains and sixty (60) links; thence North 26 degrees 30 minutes West nine (9) chains; thence North 8 degrees 30 minutes West fourteen (14) chains; thence West eleven (11) chains and thirty-five (35) links; thence North three (3) chains and fifty (50) links, to Section line between Section Twenty-Four (24) and said Section Twenty-Five (25); thence West with said Section line Nine (9) chains and fifty (50) links to the Northwest Corner of Section Twenty-Five (25); thence South with Section line between Sections Twenty-Five (25) and Twenty-Six (26) to the Southwest Corner of said Northwest Quarter; thence East to the point of beginning.

Also, thirty-nine (39) acres of land, more or less, off of the West side of Section Twenty-Four (24), Township

Eight (8), Range Seven (7) West, South of Tallahatchie River, having the following metes and bounds: Beginning at the Southwest Corner of said Section Twenty-Four (24); thence East nine (9) chains and fifty (50) links; thence North to said Tallahatchie River; thence with the meanderings of said River to Section line between Section Twenty-Three (23) and said Section Twenty-Four (24); thence South with said Section line to the beginning.

Also, all of that part of Section Twenty-Three (23), Township Eight (8), Range Seven (7), West, South of Tallahatchie River, containing sixty (60) acres, more or less.

Also, one hundred and twenty (120) acres of land, more or less, in the East Half of Section Twenty-Six (26), Township Eight (8) Range Seven (7) West, having the following metes and bounds: Beginning ten (10) chains East from the center post on the North boundary line of said Section Twenty-six (26); thence South nineteen (19) degrees thirty-three (33) minutes East to the Southeast Corner of said Section; thence due North with East boundary to Northeast Corner of said Section; Thence due West on said North boundary line to beginning.

The above described lands constitute what is known as the "Potts Place," containing approximately 900 acres of land, owned by the undersigned grantor and situated about one mile southwest of Belmont Bridge, in the Second Court District of said Panola County.

The above described lands do not constitute any part of the homestead of the undersigned grantor and have never been occupied by the undersigned grantor as a homestead.

A vendor's lien is hereby expressly reserved and retained by the undersigned grantor upon the lands herein conveyed to secure the payment of the unpaid balance of said purchase price, evidenced by the above mentioned installment purchase money notes; and said indebtedness is further secured by a first mortgage deed of trust on said lands executed by the grantee herein of even date herewith.

The grantee herein has expressly assumed and agreed to pay all taxes and assessments, levied and assessed against the above described lands for the year 1946; and all taxes and assessments levied and assessed against said lands for the year 1946 and all succeeding years are excepted from the warranty contained in this deed.

Witness my signature, this the 1st day of January, 1946.

(Signed) J. S. WOODS.

State of Mississippi,
Panola County.

Before Me, Anna Maye Gillespie, a Notary Public in and for Panola County, in the State of Mississippi, duly commissioned, qualified and acting, this day personally appeared the above named J. S. Woods, grantor in the foregoing deed of conveyance, who acknowledged that he signed and delivered the foregoing deed of conveyance on the day and year therein mentioned as his voluntary act and deed and for the purposes and consideration therein stated.

Given under my hand and seal of office at Sardis, Mississippi, this the 21st day of January, 1946.

(Signed) ANNA MAYE GILLESPIE,
(Seal) Notary Public.

My Commission expires Feb. 2, 1948.

Filed for record on Jan. 22, 1946.

Recorded at Pages 174, 175 & 176 of Book E-1, Records land deeds of 2nd Court District Panola County, Miss.

EXHIBIT No. 5 TO SECOND AMENDED COMPLAINT.

31 Mortgage Deed of Trust.

Carl A. McCown Et Ux
to
J. S. Woods.

John W. Kyle, Trustee.

This Indenture, Made and entered into this the 1st day of January, 1946, between Carl A. McCown and his wife, Louise McCown of Panola County, in the State of Mississippi, as parties of the first part, and John W. Kyle, as Trustee and party of the second part, and J. S. Woods, of Panola County, in the State of Mississippi, as party of the third part, Witnesseth:

That, whereas, the said Carl A. McCown, party of the first part, is indebted to the said J. S. Woods, party of the third part, in the principal sum of Fifty-Four Thousand Dollars ($54,000.00), for the unpaid balance of the purchase price to be paid by the said Carl A. McCown to the said J. S. Woods for the lands hereinafter described which said indebtedness is evidenced by fourteen promissory notes of even date herewith, signed by the said Carl A. McCown, as maker, and payable to the said J. S. Woods, or his order, in the several amounts and becoming due and payable as follows:

One note for the principal sum of $2,500.00, due January 1, 1947;

One note for the principal sum of $2,500.00, due January 1, 1948;

One note for the principal sum of $4,000.00, due January 1, 1949;

One note for the principal sum of $4,000.00, due January 1, 1950;

One note for the principal sum of $4,000.00, due January 1, 1951;

One note for the principal sum of $4,000.00, due January 1, 1952;

One note for the principal sum of $4,000.00, due January 1, 1953;

One note for the principal sum of $4,000.00, due January 1, 1954;

One note for the principal sum of $4,000.00, due January 1, 1955;

One note for the principal sum of $4,000.00, due January 1, 1956;

One note for the principal sum of $4,000.00, due January 1, 1957;

One note for the principal sum of $4,000.00, due January 1, 1958;

One note for the principal sum of $4,000.00, due January 1, 1959 and

One note for the principal sum of $5,000.00, due January 1, 1960—

each of said notes bearing interest from January 1, 1946, until paid, at the rate of four per cent (4%) per annum, interest payable annually on the First day of January of each year, and each of said notes providing for the payment of a ten per cent attorney's fee, if placed in the hands of an attorney for collection, and providing for accelleration of payment of principal if default be made in the payment of any one of said notes, or any part thereof, or any interest thereon, when due; and

Whereas, the said parties of the first part have agreed to secure the prompt payment of said indebtedness, when due:

Therefore, in consideration of the premises and the sum of Ten Dollars, to the parties of the first part paid by John W. Kyle, party of the second part, who is hereby constituted and appointed Trustee herein, the receipt of which is hereby acknowledged, the said parties of the first part have this day granted, bargained and sold, and by these presents do give, grant, bargain, sell and convey to the said party of the second part, as Trustee aforesaid, and his successors, the following described lands, lying and being situated in the Second Court District of Panola County, in the State of Mississippi, to-wit:

The Northeast Quarter of Section Twenty-Five (25) Township Eight (8), Range Seven (7) West; and

Also, fifty-one (51) acres of land off of the Northwest Quarter of said Section Twenty-Five (25), having the following metes and bounds: Beginning eleven (11) chains North of the Southeast Corner of the said Northwest

Quarter; thence North 72 degrees 55 minutes West, thirteen (13) chains and sixty (60) links; thence North 26 degrees 30 minutes West, nine (9) chains; thence North 8 degrees 30 minutes West, fourteen (14) chains; thence West eleven (11) chains and thirty-five (35) links; thence North three (3) chains and fifty (50) links to Section line between Sections Twenty-four (24) and Twenty-Five (25); thence East thirty (30) chains and fifty (50) links to Northeast Corner of said Northwest Quarter; thence South twenty-nine (29) chains to beginning.

Also, thirty (30) acres of land, more or less, in the Southeast Quarter of Section Twenty-Four (24), Township Eight (8), Range Seven (7), West, being all of said quarter section South of Hotophia Creek; and

Also, all of the West Half of said Section Twenty-Four (24) South of Tallahatchie River and West of Hotophia Creek, except thirty-nine (39) acres on the West side thereof, which said thirty-nine (39) acres is described as: Beginning at the Southwest Corner of said Section Twenty-four (24); thence East nine (9) chains and fifty (50) links; thence North to said Tallahatchie River; thence with the meandering of said River to the Section line between Sections Twenty-Three (23) and Twenty-Four (24); thence South, with the said Section line, to beginning—the part of said West Half of said Section herein conveyed containing one hundred and seventy-one (171) acres, more or less.

Also, the Southwest Quarter of Section Twenty-Five (25), Township Eight (8), Range Seven (7), West; and

Also, one hundred and nine (109) acres of land, more or less, in the Northwest Quarter of said Section Twenty-Five (25), having the following metes and bounds: Be-

ginning at the Southeast Corner of said Quarter section; thence North eleven (11) chains; thence North 72 degrees 55 minutes West thirteen (13) chains and sixty (60) links; thence North 26 degrees 30 minutes West nine (9) chains; thence North 8 degrees 30 minutes West fourteen (14) chains; thence West eleven (11) chains and thirty-five (35) links; thence North three (3) chains and fifty (50) links, to Section line between Section Twenty-four (24) and said Section Twenty-Five (25); thence West with said Section line nine (9) chains and fifty (50) links to the Northwest Corner of Section Twenty-five (25); thence South, with Section line between Sections Twenty-five (25) and Twenty-Six (26), to the Southwest Corner of said Northwest Quarter; thence East to the point of beginning.

Also, thirty-nine (39) acres of land, more or less, off of the West side of Section Twenty-Four (24) Township Eight (8), Range Seven (7) West, South of Tallahatchie River, having the following metes and bounds: Beginning at the Southwest Corner of said Section Twenty-Four (24); thence East nine (9) chains and fifty (50) links; thence North to said Tallahatchie River; thence with the meanderings of said River to Section line between Section Twenty-Three (23) and said Section Twenty-Four (24); thence South with said Section line to beginning.

Also, all of that part of Section Twenty-Three (23), Township Eight (8), Range Seven (7) West, South of Tallahatchie River, containing sixty (60) acres, more or less.

Also, one hundred and twenty (120) acres of land, more or less, in the East Half of Section Twenty-six, (26), Township Eight (8), Range Seven (7) West, having the

following metes and bounds: Beginning ten (10) Chains East from the center cost on the North boundary line of said Section Twenty-Six (26); thence South nineteen (19) degrees and thirty-three (33) minutes East, to the Southeast Corner of said Section; thence due North with East boundary to Northeast Corner of said Section; thence due West on said North boundary line to beginning—

The above described lands being the lands, known as the "Potts Place," situated about one mile southwest of Belmont bridge, in the Second Court District of Panola County, Mississippi, and being the lands this day conveyed to the above named Carl A. McCown by the said J. S. Woods by warranty deed dated January 1, 1946, and filed for record in the office of the Chancery Court Clerk of said Panola County, at Batesville, Mississippi.

And the said parties of the first part covenant and agree to warrant and forever defend the title to said above described lands, with the appurtenances thereto, to the said Trustee and his successors.

This conveyance is made In Trust, however, and is subject to the following limitations and conditions, to-wit:

Should the said Carl A. McCown, party of the first part, promptly pay the above mentioned indebtedness, evidenced by said series of notes, as aforesaid, when and as the same shall become due, as aforesaid, then this instrument to be void. But if default be made in the payment of said indebtedness, or any part thereof, or any interest thereon, when due, all of said notes and indebtedness shall become due and payable at once, at the option of the said party of the third part, or the legal

holder, or holders of said notes, whether the same be then due according to the dates of maturity stated in said notes or not, and the said party of the second part, as Trustee aforesaid, at the request of the said party of the third part, or his legal representatives or assigns, shall take possession of the above described property, being the lands hereinabove described and after giving notice of the time, place and terms of sale by a notice published for three consecutive weeks preceding such sale in a newspaper published in the Second Court District of Panola County, Mississippi, and by posting a copy of said notice of sale at the front door of the County Courthouse, in the Second Court District of said Panola County, for three weeks preceding such sale, shall sell said property, being the lands hereinabove described, at public out-cry, to the highest bidder, or bidders, for cash, at the front door of the County Courthouse, in the Second Court District of said Panola County, within lawful hours, on the day designated therefor in said notice of sale, and shall execute a written conveyance of said lands to the purchaser, or purchasers, which shall vest in such purchaser, or purchasers, a full and perfect title to said lands, with the right of immediate possession thereof.

The said Trustee may sell said lands, as provided herein, on any day that he may designate therefor in said notice of sale, it being the intention of the parties hereto to vest in said Trustee full discretion in fixing the time for making said sale.

The proceeds derived from the sale of said lands, as aforesaid, shall be applied by the Trustee, first, to the payment of all costs and expenses incurred by the Trustee in advertising and selling said property, including a commission of three per cent (3%) of the amount of the proceeds of such sale to be retained by the Trustee as

compensation for his services in executing said trust, and secondly, to the payment of the indebtedness hereinabove described which at that time remain unpaid, whether said notes be then due according to the dates of maturity stated in said notes or not, and all interest accrued thereon to the date of such sale. For it is expressly stipulated and agreed that, if default be made in the payment of any of the above described notes, when due, the said party of the third part, his legal representatives or assigns shall have the right to an immediate foreclosure of this deed of trust, and the Trustee shall be authorized forthwith, at the request of the said party of the third part, his legal representatives, or assigns, to take possession of said property, being the lands hereinabove described, and advertise and sell the same for the payment of said indebtedness and all costs and expenses, as provided in this deed of trust; and, in such event, all of said notes which at that time remain unpaid shall become due and payable at once, whether the same be then due according to the dates of their maturity or not, and shall be collectible out of the proceeds of such sale.

If there be a surplus, after the payment of said costs and expenses and all of the notes and interest secured by this deed of trust, such surplus shall be paid over to the said Carl A. McCown, party of the first part.

The said parties of the first part covenant and agree to pay all taxes that may be levied and assessed against the above described lands during the life of this deed of trust, when and as the same shall become due. And, in the event the said parties of the first part shall fail to pay said taxes, or any part thereof, when and as the same shall become due the said party of the third part may pay the same, and any and all amounts so paid by the said party of the third part shall be repaid to the said

party of the third part by the said parties of the first part on demand, and until so repaid shall become a part of the indebtedness secured by this deed of trust and shall bear interest at the rate of four per cent (4%) per annum.

If the above described property shall at any time become endangered as a security for said indebtedness, the Trustee may take the same into his possession and hold or control the same until said indebtedness and all costs are liquidated by payment thereof or sale of said property; but, until demanded by the Trustee, the said parties of the first part shall hold the same subject to this deed of trust.

In case of failure, refusal, death or inability on the part of said Trustee to execute the trust herein confided, the said party of the third part, his legal representatives, or assigns, can, at any time, appoint a Trustee to act in his place and stead, or in the place and stead of any succeeding Trustee, which appointment shall be made in writing and shall be put of record in the office of the Chancery Court Clerk of the Second Court District of said Panola County before the first advertisement of sale shall have been published, and shall vest in such succeeding Trustee all of the title and powers herein conferred upon his predecessor.

The indebtedness secured by this deed of trust is further secured by a vendor's lien on the above described lands reserved and retained in the deed of conveyance of said lands this day executed by the said J. S. Woods to the said Carl A. McCown.

All right, powers and privileges herein conferred upon or vested in the said party of the third part are likewise

conferred upon and vested in his legal representatives and assigns.

In Testimony Whereof, the said parties of the first part have hereunto set their hands, the day and year first above written.

(Signed) C. A. McCOWN.

State of Mississippi,
Panola County.

Before Me, M. E. Jarrett, a Notary Public, in and for Panola County, in the State of Mississippi, duly commissioned, qualified and acting, this day personally appeared the above named Carl A. McCown and his wife, Louise McCown, grantors in the foregoing deed of trust, who severally acknowledged that they, and each of them, signed and delivered the foregoing deed of trust on the day and year therein mentioned as their voluntary act and deed and for the purposes and consideration therein stated.

Given under my hand and seal of office at Batesville, Mississippi, this the 22nd day of January, 1946.

(Signed) M. E. JARRETT,
(Seal) Notary Public.

My commission expires December 31, 1947.

EXHIBIT No. 6 TO SECOND AMENDED COMPLAINT.

39 Mortgage Deed of Trust.

Carl A. McCown
to
J. S. Woods

John W. Kyle, Trustee.

State of Mississippi,
Panola County.

This Indenture, made and entered into this the 1st day of January, 1946, between Carl A. McCown, of the County of Panola and State of Mississippi, of the first part, and J. S. Woods, of the County of Panola, in the State of Miss. of the second part, Witnesseth:

That, whereas, the said Carl A. McCown, party of the first part, is justly indebted to the said J. S. Woods, party of the second part, in the principal sum of $54,000.00, for the unpaid balance of the purchase price of approximaely 900 acres of land, lying and being situated about one mile southwest of Belmont bridge, in the Second Court District of Panola County, Mississippi, known as the "Potts Place," this day conveyed by the said J. S. Woods to the said Carl A. McCown, which said indebtedness is evidenced by fourteen promissory notes, of even date herewith, signed by the said Carl A. McCown, as maker, and payable to the said J. S. Woods, or his order, in amounts and becoming due and payable as follows: One note for the principal sum of $2,500.00, becoming due and payable on the First Day of January of each of the years 1947 and 1948, and one note for the principal sum of $4,000.00 becoming due and payable on the First Day of January of each of the years 1949 to 1959,

both inclusive, and one note for the principal sum of $5,000.00 becoming due and payable on the First Day of January, 1960—each of said notes bearing interest from the date thereof until paid at the rate of four per cent (4%) per annum, interest payable annually, and providing for the payment of a ten per cent attorney's fee, if placed in the hands of an attorney for collection, and providing for acceleration of payment of the principal thereof if default be made in the payment of any of the notes of said series of notes, or any interest thereon, when due, and all of said notes being secured by a vendor's lien and a first mortgage deed of trust upon said lands, known as the "Potts Place"; and

Whereas, the said party of the first part has agreed to further secure the prompt payment of the first three notes of the above mentioned series of notes, when due, by a mortgage deed of trust on the lands and other property hereinafter described—the notes hereby secured being the above mentioned $2,500.00 note becoming due January 1, 1947, and the above mentioned $2,500.00 note becoming due January 1, 1948, and the above mentioned $4,000.00 note becoming due January 1, 1949, as aforesaid:

Therefore, in consideration of the premises and the sum of One Dollar to the said party of the first part paid by John W. Kyle, who is hereby constituted and appointed Trustee herein, the receipt of which is hereby acknowledged, the said party of the first part has this day granted, bargained and sold, and by these presents does give, grant, bargain, sell and convey to the said Trustee and his successors the following described property, located, lying and being situated in the Second Court District of Panola County, in the State of Mississippi, to-wit:

Those certain lots, tracts or parcels of land situated in the Second Court District of the County of Panola and

State of Mississippi, and being situated in Sections 5 and 6, Township 9 South, Range 7 West, and Section 32, Township 8 South, Range 7 West, more particularly described as follows:

Beginning at a point on the center line of the Old Panola Road that is 760 feet West of the Northeast Corner of Section 6, Township 9, Range 7 West, run South 7 degrees East along said road 243 feet to a point; thence North 32 degrees 29 minutes East 78.6 feet to a point in the East right-of-way line of said road, which point is the point of beginning of the description of the land herein conveyed; thence continuing North 32 degrees 25 minutes East 30.6 feet to a point; thence North 20 degrees 18 minutes East 146.5 feet to a point; thence North 13 degrees .06 minutes East 220 feet to a point; thence North 1 degree 37 minutes West 80.4 feet to a point; thence North 14 degrees 16 minutes West 296 feet to a point; thence North 8 degrees 54 minutes West 41.4 feet to a point; thence North 6 degrees 54 minutes East 228.4 feet to a point; thence North 47 degrees 23 minutes East 357.8 feet to a point by a twin holly; thence North 74 degrees 12 minutes West 3964.7 feet to a point on the West bank of the Tallahatchie River; thence in a Southwesterly direction along the said West Bank the following bearings and distances: South 42 degrees .09 minutes West 200.2 feet; South 19 degrees 12 minutes West 312.5 feet; South 11 degrees .07 minuts East 200 feet; South 30 degrees 21 minutes East 551.2 feet; South 7 degrees 31 minutes East 189.6 feet; South 29 degrees 17 minutes West 218.4 feet; South 84 degrees 15 minutes West 13.1 feet; North 84 degrees and 15 minutes West 222 feet; North 60 degrees 29 minutes West 238.4 feet; North 85 degrees 16 minutes West 576.1 feet; South 60 degrees 24 minutes West 282.8 feet; South 29 degrees 13 minutes West 289.5 feet; South 15 degrees and 11 minutes West 334.1 feet;

South 14 degrees 19 minutes East 237.7 feet; South 50 degrees 50 minutes East 443 feet; South 4 degrees 42 minutes East 140.0 feet; South 48 degrees 57 minutes West 190.7 feet; South 86 degrees 01 minutes West 533.6 feet; South 65 degrees 58 minutes West 242.2 feet; South 44 degrees 34 minutes West 337.6 feet; South 24 degrees 43 minutes west 235.6 feet; South 4 degrees 18 minutes West 201.7 feet; South 27 degrees and 21 minutes West 425.7 feet; South 8 degrees 28 minutes West 461.2 feet 47 degrees 21 minutes West 730.7 feet to a point on the East right-of-way line of the Old Panola Road; thence along said right-of-way line the following bearings and distances: North 43 degress 21 minutes West 125.4 feet; North 2 degrees 57 minutes West 755.75 feet; North 29 degrees 27 minutes West 374.8 feet; North 3 degrees 24 minutes West 579.5 feet; North 6 degrees 41 minutes East 411.2 feet; North 7 degrees West 423.7 feet to point of beginning, and containing 200 acres, more or less.

Also, the following described lot, tract or parcel of land, situated in the Second Court District of Panola County, Mississippi, and in the East Half of Section 6, Township 9, Range 7 West, to-wit:

Begin at a point on the center line of Old Panola Road that is 760 feet West of the Northeast Corner of Section 6, Township 9, Range 7 West, run South 7 degrees East along the center line of said Old Panola Road 243 feet to a point, which said point is the beginning of the description of the land conveyed herein; thence North 32 degrees 29 minutes East 78.6 feet to a point in the East right-of-way line of said road: thence in a Southerly direction along and with the Easterly right-of-way line and a distance of 50 feet from the center of said Old Panola Road in a Southerly direction to the point of its intersection with the Tallahatchie River, thence in a South-

westerly direction along and with Tallahatchie River to its point of intersection with the center line of said Old Panola Road; thence in an Northerly direction along and with the center line of said Old Panola Road to the point of beginning, and being the land conveyed to James E. Wilson by L. Wilder and wife by deed of record in Book B-1, at page 357.

The above described lands are the lands conveyed to the said Carl A. McCown by James E. Wilson and wife, Willie Belle Wilson by warranty deed dated the 28th day of August, 1944, and recorded in Book C-1, at page 279, of the records of Land Deeds in the office of the Chancery Court Clerk of said Panola County, at Batesville, Mississippi. Said lands are subject to an easement for the power line of Tallahatchie Valley Electric Power Association.

Also, the following described, personal property, now owned by the said party of the first part and used during the year 1945 in the farming operations on the above described land, all of which is to be transferred immediately to the said "Potts Place" for use in the farming operations on said "Potts Place" during the year 1946 viz.;

1 Model A. John Deere tractor, Serial No. 507698.
1 Athens Bush and Bog Disc.
1 red horse mule, 6 years old, named "Jake".
1 red mare mule, 6 years old, named "Kate".
1 iron gray mule, 7 years old, named "Rock".
1 mare, 8 years old, acquired from Lud Hentz.
4 white face cows.

And the party of the first part covenants and agrees to warrant and forever defend the title to the above de-

scribed property, with its appurtenances, to the said Trustee and his successors.

This conveyance is made in Trust, however, and is subject to the following limitations and conditions, to-wit:

Should the said party of the first part promptly pay the first three installments of the above mentioned indebtedness, evidenced by said two notes for $2,500.00 each, due January 1, 1947, and January 1, 1948, respectively, and said note for $4,000.00 due January 1, 1949, with interest as provided therein, when and as the same shall become due, then this instrument to be void. But if default be made in the payment of any of said first three installments of said indebtedness, as aforesaid, or any part thereof, or any interest thereon, when due, as aforesaid, the said Trustee, at the request of the said party of the second part, or his legal representatives or assigns, shall take possession of said property, being the lands and personal property, herinabove described, and after giving notice of the time, place and terms of sale by a notice published for three consecutive weeks preceding such sale in a newspaper published in the Second Court District of Panola County, Mississippi, and by posting a copy of said notice of sale at the front door of the County Courthouse in said District and County, for three weeks preceding such sale, shall sell said property, being the lands and personal property hereinabove described, at public out-cry to the highest bidder, or bidders, for cash, at the front door of the County Courthouse, in the Second Court District of said Panola County, within lawful hours, on the date designated therefor by the said Trustee in said notice of said sale, and shall execute a written conveyance of said property to the purchaser, or purchasers, which conveyance shall vest in

such purchaser, or purchasers, a full and perfect title to said property, with the right of immediate possession thereof.

The proceeds derived from the sale of said property, as aforesaid, shall be applied by the Trustee to the payment of the above mentioned indebtedness evidenced by said two notes for $2,500.00 each, due January 1, 1947, and January 1, 1948, respectively, and said note for $4,000.00 due January 1, 1949, as aforesaid, and all costs incurred herein. And, it is expressly stipulated and agreed that, if default be made in the payment of any of of the above mentioned three notes, which are secured by this deed of trust, when due, the party of the second part, his legal representatives or assigns, shall have the right to an immediate foreclosure of this deed of trust, and the Trustee shall be authorized forthwith, at the request of the said party of the second part, his legal representatives or assigns, to take possession of said property, being the lands and personal property hereinabove described, and advertise and sell the same for the payment of said indebtedness and all costs and expenses, as provided in this deed of trust; and, in such event, all of that part of said three notes which at that time remains unpaid shall become due and payable at once, and shall be collectible out of the proceeds of such sale. If there be a surplus, after the payment of said three notes, with interest, and the costs and expenses incurred by the Trustee in advertising and selling said property, such surplus shall be paid over to the said party of the first part.

The said party of the first part covenants and agrees to pay all taxes that may be levied and assessed against the above described property during the life of this deed of trust, when and as the same shall become due. And, in the event the said party of the first part shall fail to

pay said taxes, when and as same shall become due, the said party of the second part may pay the same, and any and all amounts so paid by the said party of the second part shall be repaid to the said party of the second part by the said party of the first part on demand, and until so repaid shalll become a part of the indebtedness secured by this deed of trust and shall bear interst at the rate of four per cent (4%) per annum.

If the above described property shall at any time become endangered as a security for said indebtedness, the Trustee may take the same into his possession and hold or control the same until said indebtedness and all costs are liquidated by payment thereof or sale of said property; but, until demanded by the Trustee, the said party of the first part shall hold the same subject to this deed of trust.

In case of failure, refusal, death or inability on the part of said Trustee to execute the trust herein confided, the said party of the second part, his legal representatives or assigns, can, at any time, appoint a Trustee to act in his place and stead, or in the place and stead of any succeeding Trustee, which appointment shall be made in writing and shall be put of record in the office of the Chancery Court Clerk of the Second Court District of said Panola County before the first advertisement of sale shall have been published and shall vest in such succeeding Trustee all the title and powers herein conferred upon his predecessor.

All rights, powers and privileges herein conferred upon or vested in the said party of the second part are likewise conferred upon and vested in his legal representatives and assigns.

This deed of trust is a second mortgage deed of trust on the lands hereinabove described and conveyed and is subordinate to a first mortgage deed of trust given by the party of the first part to D. R. Johnson, as Trustee, on the 28th day of August, 1944, to secure the payment of the balance of the purchase price of said lands owing by the said party of the first part to James E. Wilson which said deed of trust duly recorded in Book 162 at page 101 of the records of Land Deeds of Trust in the office of the Chancery Court Clerk of said Panola County, at Batesville, Mississippi. The balance of said purchase price which mortgage indebtedness against said lands when and as the same shall become due, so as to preserve said property as security for the indebtedness secured by this deed of trust, and so as to preserve the line herein created as additional security for the payment of the indebtedness secured by this deed of trust.

The indebtedness secured by this deed of trust, which, as stated above, constitutes a part of the unpaid balance of the purchase price which the said party of the first part has agreed to pay to the said party of the second part for the lands described as the "Potts Place," situated about one mile southwest of Belmont Bridge, in the Second Court District of said Panola County, is secured by a vendor's lien and a first mortgage deed of trust on said lands known as the "Potts Place," as security for the payment of all of the unpaid balance of the purchase price which the said party of the first part has agreed to pay to the said party of the second part for said lands as the "Potts Place," which said balance is evidenced by the above mentioned fourteen notes, aggregating the total principal sum of $54,000.00. This deed of trust is given as additional and cumulative security, to further secure the prompt payment of the first three notes of said series, as aforesaid, when due, as aforesaid.

The party of the first part hereby certifies that the lands hereinabove described constitute no part of the homestead of the said party of the first part and have never been occupied by the said party of the first part as a homestead.

In Witness Whereof, the said party of the first part has hereunto set his hand, the day and year first above written.

(Signed) CARL A. McCOWN.

State of Mississippi,
Panola County.

Before me, Anna Maye Gillespie, Notary Public in and for Panola County, in the State of Mississippi, duly commissioned, qualified and acting, this day personally appeared the above named Carl A. McCown, grantor in the foregoing instrument, who acknowledged that he signed and delivered the foregoing instrument on the day and year therein mentioned as his voluntary act and deed and for the purposes and consideration therein stated.

Given under my hand and seal of office, at Sardis, Mississippi, this the 21st day of January, 1946.

(Signed) ANNA MAYE GILLESPIE,
(Seal) Notary Public, Panola County, Miss.

My commission expires February 2nd, 1948.

Second Amended Complaint. Filed this 27 day of October, 1947.

ANSWER OF DEFENDANT TO SECOND AMENDED COMPLAINT.

48 (Title Omitted.)

Now comes J. S. Woods, the defendant in the above numbered and styled cause in this Court, and, for answer to the Second Amended Complaint filed against him herein, says that:

Count #1.

1, 2, 3, 4 & 5.

He admits the allegations of paragraphs 1, 2, 3, 4 and 5. Further answering paragraph 1, he says that the Complainant is, and was at all times mentioned in the complaint, engaged in the real estate brokerage business in the State of Mississippi; that the Complainant has never become domesticated in the State of Mississippi as authorized by Section 5339 of the Mississippi Code of 1942; that it has never qualified to do business in the State of Mississippi as required by Section 5343 of said code; that it has never designated a resident agent in the State of Mississippi as required by the second paragraph of Section 5319 of said code; that it has never paid any privilege license tax to engage in said business in the State of Mississippi as required by Section 155 of Chapter 137 of the Mississippi Laws of 1944; and that, therefore, the Complainant was not capable of making an enforceable contract in the State of Mississippi and is not entitled to maintain any suit in any Court in said state.

6, 7 & 8.

He denies the allegations of paragraphs 6, 7 and 8. He says that the truth with reference to the matters al-

leged in said paragraphs is as follows: In the year 1944 the defendant made a verbal agreement with the said Partee that if, within a period of ninety days from the date of the agreement, Partee would produce a purchaser for the land at a price in excess of $70,000.00, he would pay Partee the amount in excess of $70,000.00 as his commission. This 90-day period expired without Partee producing a purchaser. On March 12, 1945, the defendant entered into a written agreement with United Service & Research, Inc., (which company was then being represented by D. S. Cline and not by L. A. Conolly) that if, within a period of ninety days from said date, said company would produce a purchaser for the land at a price of at least $70,000.00, he would pay said company a commission of 5% of the purchase price. This 90-day period expired on June 12, 1945, without said company producing a purchaser. On or about June 13, 1945, Partee telephoned the defendant from Memphis and told the defendant that he (Partee) had located a purchaser for the property and that he (Partee) would call on the defendant at Sardis, Mississippi, on the following day and discuss the matter. On the following day Partee called on the defendant, and on that date the defendant made a verbal agreement with Partee that if, within 75 or 90 days (the defendant not now recalling the exact number of days agreed upon) Partee would produce a purchaser for the land at a price of at least $68,500.00, he would pay Partee a commission of 5% of the purchase price. The agreed period expired without Partee producing a purchaser. At Partee's request he was then given an extension of ten additional days within which to produce a purchaser on said terms, but this extension also expired without Partee producing a purchaser. The expiration of said extension, on or about September 15, 1945, left the defendant under agreement to no one with reference to the sale of said land. Up to

this point he had never authorized any one to offer his personal property for sale. Further answering paragraphs 6, 7 and 8, he says that the allegations of said paragraphs are not pertinent or relevant to the cause of action attempted to be stated in the complaint, and he moves the Court to strike said paragraphs from the complaint.

9.

Having no knowledge nor means of knowledge as to the allegations of paragraph 9, he denies said allegations. He says further that said allegations are not pertinent or relevant to the cause of action attempted to be stated in the complaint, and he moves the Court to strike said paragraph from the complaint.

10.

He admits the allegations of paragraph 10, except that he denies that said contract was entered into in Memphis, Tennessee. He states the truth to be that said contract was prepared by the complainant and was submitted to him for acceptance and execution in the Town of Sardis, Mississippi. He says further that he accepted and executed the same in the Town of Sardis, Mississippi.

11.

He admits the allegations of paragraph 11, except that he denies that the terms of sale proposed to him, as set out in said paragraph, were satisfactory to him. He says further that the property of the said McCown was already subject to a valid first lien to secure an indebtedness of $9,500.00 and that the said McCown had an equity

therein of only $3,500.00 which equity had no sound loan value.

12 & 13.

He admits the allegations of paragraph 12 and 13. He states further that, for the consideration stated in said deed (Exhibit 4), he also conveyed to McCown, by bill of sale showing only a nominal consideration, the personal property listed in Exhibit 3 and other personal property.

14 & 15.

He admits the allegations of paragraphs 14 and 15.

16.

He denies the allegations of paragraph 16.

17.

He admits the allegations of paragraph 17.

18.

He denies the allegations of paragraph 18.

And now, having fully answered Count #1 of the complaint, he prays that the same be dismissed.

Count #2.

1 through 15.

For answer to the first 15 paragraphs of Count #2 of the complaint, he adopts the answers hereinabove made

to the first 15 paragraphs of Count #1, said paragraphs being identical.

16.

He denies the allegations of paragraph 16.

17 and 18.

For answer to paragraphs 17 and 18 of Count #2 of the complaint, he adopts the answers hereinabove made to paragraphs 17 and 18 of Count #1, said paragraphs being identical.

And now, having fully answered Count #2 of the complaint, he prays that the same be dismissed.

(Signed) JOHN W. KYLE,
(John W. Kyle)

Sardis, Mississippi.

McCLURE & FANT,
(Signed) By HERBERT M. FANT,
Attorneys for Defendant.

Sardis, Mississippi.

51 CERTIFICATE.

I, the undersigned Herbert M. Fant, a member of the law firm of McClure & Fant, of counsel for the defendant, hereby certify that I have this day mailed, postage prepaid, a true copy of the foregoing answer of the defendant unto Honorable Phil Stone, Attorney for the Complainant, properly addresed to him at his correct post office address in the City of Oxford, Mississippi.

This the 22nd day of November, 1947.

(Signed) HERBERT M. FANT,
Of Counsel for Defendant.

Sardis, Mississippi.

Filed this 24 day of Nov., 1947.

53 REQUEST FOR ADMISSION.

(Title Omitted.)

Now comes the defendant, J. S. Woods, and hereby requests the complainant, Interstate Realty Company, to admit for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial, the truth of each of the following statements:

1. The Complainant is, and was at all times mentioned in the complaint, engaged in the real estate brokerage business in the State of Mississippi.

2. The Complainant has never become domesticated in the State of Mississippi as authorized by Section 5339 of the Mississippi Code of 1942.

3. The Complainant has never qualified to do business in the State of Mississippi as required by Section 5343 of said Code.

4. The Complainant has never designated a resident agent in the State of Mississippi as required by the second paragraph of Section 5319 of said code.

5. The Complainant has never paid any privilege license tax to engage in the real estate brokerage business in the State of Mississippi as required by Section 155 of Chapter 137 of the Mississippi Laws of 1944.

6. In each of one or more years immediately preceding the 20th day of November, 1945, the Complainant (a) accepted a substantial number of employments to locate purchasers for tracts of real estate located in the

State of Mississippi, (b) consummated a substantial number of sales of real estate located in the State of Mississippi, (c) advertised, in newspapers and otherwise, that its agents would meet prospective purchasers in the State of Mississippi and show them lands listed with it for sale, (d) sent its agents on frequent trips into the State of Mississippi in and about its real estate brokerage business, (e) solicited and accepted in the State of Mississippi a substantial number of employments to sell real estate, (f) collected a substantial amount of money as compensation for services rendered by it as a real estate broker in the State of Mississippi, and (g) performed in the State of Mississippi, on a substantial number of occasions, all of the acts necessary to the operation of a real estate brokerage business.

Unless, within ten days from this date, the Complainant shall file and serve a sworn denial of the foregoing statements, said statements shall be deemed admitted in accordance with Rule 36 of the Federal Rules of Civil Procedure.

This the 24th day of November, 1947.

(Signed) JOHN W. KYLE.
(John W. Kyle)

Sardis, Mississippi.

McCLURE & FANT.
(Signed) By JAMES McCLURE.
(James McClure)
Attorneys for J. S. Woods,
Defendant.

Sardis, Mississippi.

I hereby certify that I have this day mailed, postage fully prepaid, a true and correct copy of the foregoing "Request for Admission" to each of the attorneys for the

above named Complainant at their correct postoffice addresses, namely and to-wit: Hon. Phil Stone, Oxford, Mississippi, and Hon. L. C. Andrews, Oxford, Mississippi.

Witness my signature on this the 24th day of November, 1947.

(Signed) JAMES McCLURE
Of Counsel for Defendant.

Filed this 25 day of Nov., 1947.

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55 COMPLAINANT'S ADMISSION OF FACTS.

(Title Omitted.)

In response to the Request for Admissions heretofore filed herein by the defendant, and in order that the Court may be advised of certain other facts admitted by it, the complainant, Interstate Realty Company, hereby admits that the following statements are true and correct.

1. The complainant is now, was at all times mentioned in the complaint, and has been for several years engaged in the real estate business in the State of Tennessee, having an office at 107 Madison Avenue, Memphis, Tennessee. Complainant has made sales of real estate in the State of Mississippi as will be more definitely set out later herein.

2. Complainant has never become domesticated in the State of Mississippi as authorized by Section 5339 of the Mississippi Code of 1942 for the reason that complainant was, and still is, of the opinion that it was not, and is not, doing business in the State of Mississippi within the purview of the Mississippi statutes relating thereto.

3. Complainant has never qualified to do business in the State of Mississippi as required by Section 5343 of said code for the reasons set out in paragraph 2 above.

4. Complainant has never designated a resident agent in the state of Mississippi as required by the second paragraph of Section 5319 of said code for the reasons set out in paragraph 2 above.

5. Complainant has never paid any privilege license tax to engage in the real estate brokerage business in the State of Mississippi as required by Section 155 of Chapter 137 of the Mississippi Laws of 1944 for the reason set out in paragraph No. 2 above.

6. (a) In each year for the years 1942-1946, both inclusive, Complainant has accepted employment to locate purchasers for tracts of real estate located in the State of Mississippi.

(b) Complainant has consummated sales of real estate located in the State of Mississippi and those sales and commissions, together with total sales and commissions earned by Complainant in all of its business are hereby set out:

	Total Commissions in all States	Mississippi Commissions	Percentage of Mississippi Commissions to Total Commissions
1942	$ 22,756.45	$ 2,121.75	9.324
1943	$ 24,600.45	$ 4,064.25	16.521
1944	$ 58,003.90	$12,000.00	20.688
1945	$ 78,428.71	$14,272.27	18.198
1946	$ 96,684.26	$14,430.75	14.926
Total	$280,473.77	$46,889.02	16.718

	Total Sales Made	Number of Mississippi Sales	Percentage of Mississippi to Total Sales
1942	24	3	12.5
1943	28	2	7.143
1944	64	3	4.688
1945	218	14	6.422
1946	127	16	12.598
Total	461	38	8.243

(c) Complainant has never advertised in the newspapers in Mississippi that it would meet prospective purchasers at any location in Mississippi for the purpose of doing business with them and has never authorized anyone to so advertise for it. Such advertisements may have been made by Charles W. Partee at a time when he was not employed by Complainant. Complainant has advertised in Mississippi papers and in papers in other states regarding the sale of property in Mississippi and other states but this referred to sales of specific property and complainant has never maintained any office in Mississippi and has never advertised from any specific location in Mississippi. In any such advertisement by complainant the location of the office of complainant has always been given as Memphis.

(d) The agents of complainant made trips to Mississippi for the purpose of showing and selling to prospective purchasers lands listed with complainant for sale in all of those cases where sales were made as hereinabove set out, and also made trips into Mississippi for the purpose of selling and showing to prospective purchasers other lands listed with complainant for sale, where no sales were made, but complainant has never had any agent located in Mississippi and seldom have such agents stayed overnight in Mississippi.

(e). Complainant has accepted in Mississippi employments to sell real estate. Some of said employments resulted in sales being made as set forth hereinabove, but many of said employments did not result in any sale being made.

(f) The exact amount of money received by complainant from the sale of real estate located in Mississippi during the years 1942-46, both inclusive, has been set out in subdivision (b) of this paragraph.

(g) Complainant has performed in the State of Mississippi on several occasions some of the actions necessary to the operation of real estate business but it would be merely a conclusion for complainant to say that it has performed in the State of Mississippi all of the actions necessary to the operation of a real estate business. As a matter of fact, in almost all instances the final steps necessary to closing sales of real estate located in Mississippi have been taken in the Memphis office of complainant.

7. In connection with our business we sell property located in Tennessee, Arkansas, Mississippi, Southeastern Missouri, Northern Louisiana, Northwestern Alabama and Southwestern Kentucky.

8. The defendant's employment of the Complainant was solicited and accepted by the complainant in the State of Mississippi.

Respectfully submitted,
(Signed) L. C. ANDREWS,
(Signed) PHIL STONE,
Attorneys for Complainant.

Filed this 15 day of Dec., 1947.

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

59 (Title Omitted)

Now comes the defendant, J. S. Woods, and would respectfully show unto the Court:

1. That the pleadings and admissions on file herein show that there is no genuine issue between the parties hereto as to the following facts:

(a) The complainant is a corporation organized and existing under the laws of the State of Tennessee.

(b) The complainant has never become domesticated in the State of Mississippi as authorized by Section 5339 of the Mississippi Code of 1942, has never qualified to do business in the State of Mississippi as required by Section 5343 of said code, has never designated as resident agent in the State of Mississippi as required by Section 5319 of said code, and has never paid any privilege license tax to engage in the real estate brokerage business in the State of Mississippi as required by Section 155 of Chapter 137 of the Mississippi Laws of 1944.

(c) The basis of the claim asserted in Count I of the Second Amended Complaint is an express contract of employment alleged to have been obtained by the complainant from the defendant in the course of the complainant's activities in the State of Mississippi, and the basis of the claim asserted in Count II thereof is an implied contract of employment alleged to have been obtained by the complainant from the defendant in the course of the complainant's activities in the State of Mississippi.

(d) The defendant made no express or implied contract with the complainant except such as may have been made by him with the complainant in the State of Mississipi.

(e) The complainant is, and was at all times mentioned in the complaint, engaged in the real estate brokerage business in the State of Mississippi.

2. That, by reason of said facts, the complainant is not entitled to maintain any suit in any Court in the State of Mississippi.

3. That, by reason of said facts, the contracts alleged to have been obtained by the complainant were unenforceable and no suit against the defendant may be predicated thereon.

4. That, as a matter of law, the defendant is entitled to a final order of dismissal herein.

Wherefore, the defendant, acting under Rule 56 of the Federal Rules of Civil Procedure, respectfully moves the Court to enter herein a summary judgment under the terms of which the Second Amended Complaint herein will be finally dismissed at the cost of the complainant.

Respectfully submitted,

(Signed) JOHN W. KYLE,
(John W. Kyle)

Sardis, Mississippi.

McCLURE & FANT,
(Signed) By JAMES McCLURE,
(James McClure)
Attorneys for J. S. Woods,
Defendant.

Sardis, Miss.

Service of the foregoing motion, upon the complainant, Interstate Realty Company, is hereby waived. This the 15 day of December, 1947.

(Signed) L. C. ANDREWS.
(Signed) PHIL STONE.
Attorneys for Complainant.

Filed this 15 day of Dec., 1947.

62 COURT REPORTER'S TRANSCRIPT OF PROCEEDINGS.

(Title Omitted.)

Appearances:

Hon. L. C. Andrews, and Hon. Phil Stone, of Oxford, Mississippi, for the Complainant.

Messrs. McClure & Fant, and Hon. John W. Kyle, of Sardis, Mississippi, for the Defendant.

(This cause was called up by the Court and counsel for Complainant and Defendant announced ready to proceed, the pleadings were read to the Court, and the following oral proceedings were had:)

Mr. Stone:

The Complainant denies that the Motion for Summary Judgment herein should be granted because of the following reasons: First, the complainant was not doing business and is not doing business in the State of Mississipi within the purview of the applicable statutes. Second, even if the complainant was doing business in the State of Mississippi, and even if for this reason complainant could not bring and maintain this action in the Courts of the State of Mississippi, still complainant is

not barred from bringing and maintaining this action in the United States Courts, and a contrary construction of the applicable statutes of the State of Mississippi would result in depriving complainant of the full protection of the laws under Section 1 Amendment 14 of the Constitution of the United States, and would be an unlawful interference with interstate commerce, in violation of Section 3 of Article 8 of the Constitution of the United States.

(The arguments of counsel here followed, which were not reported.)

64 OPINION OF THE COURT.

It seems to me, gentlemen, to determine the question as to whether the plaintiff in this case was doing business in the State of Mississippi, it is only necessary to consider the immediate transaction before the Court.

It is admitted by the stipulations in this case that the contract of employment in this case was entered into in Mississippi; that the landholder whose land is alleged to have been contracted to be sold is a citizen of the state of Mississippi; that the entire transaction took place in Mississippi with a resident of Mississippi. That in itself seems to me beyond question to contitute doing business in Mississippi. But if we must proceed further than that, the stipulations would show that thousands of dollars worth of business had been done for years, that over a period of years numerous sales and transactions had taken place; that in an organization which sold land in Arkansas, Tennessee, Mississippi, Missouri and Kentucky, that some eight to ten percent of their business arose from transactions in Mississippi. Their agents came into Mississippi, they made contracts in Mississippi; they showed land in Mississippi; they made contracts for sales and consummated

sales here. That, in my judgment, is clearly doing business under the Mississippi law.

The case against the Memphis Publishing Company I do not think is in point at all with this case. In that case the Court was struggling with what proportion of an integrated business was done in Mississippi or without Mississippi. The Memphis Publishing Corporation is the publisher of a great newspaper. Their plant is without question located in the city of Memphis, where the newspaper is published. What the Court was trying to arrive at was whether they were doing business in this State by sending papers into it and having agents working there under it, not comparable to this at all, because this is merely a situation involving the sale of land and the entire transaction could be completed in Mississippi.

The sole question which remains to be determined in this case is whether or not under the Mississippi statute these contracts are void. There is no question that the Mississippi Legislature has a right to say that they might not use the Courts of the State of Mississippi to enforce them. They could not say that the Federal Courts would not take jurisdiction, but the mere effect of the statute is to say that Mississippi Courts may not assume jurisdiction. They have approached that problem, as I see it, in two ways. They have on certain occasions, as in the Marx & Bensdorf case and others, invoked one part of the statute and simply said you cannot use the Mississippi Courts to enforce this, and dismissed it on that ground. But in the Haygood case the Court approached the problem from a different angle, and in that case rather than to say that the Mississippi State Courts particularly cannot enforce these contracts, they went into what seems to me to be decision and not dicta, to the extent that they said these statutes made these contracts utterly void in his State and contrary to the public policy of the State. I could not personally agree that that is what the statute meant,

but I am bound by the decision of the Supreme Court of Mississippi as to what the Mississippi statutes mean, and the Federal Courts are bound by them. I think that was not dicta. The Court had a right to decide it on that point if they wanted to. I have not seen any decision of the Mississippi Supreme Court which has criticized the Haygood case, or in any way reversed the Haygood case. I think it is the law in Mississippi under the Haygood case that these contracts are void. Being void, there would be no right in this Court or any other Court to enforce them.

The motion to dismiss, or for a summary judgment, would be sustained.

Mr. Stone:
May we have an exception?

The Court:
Yes, sir.

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68 JUDGMENT

In the District Court of the United States for the Northern District of Mississippi, Western Division.

Interstate Realty Company, Complainant,
vs. No. 272 Civil.
J. S. Woods, Defendant.

This day this cause came on to be heard by agreement of the parties upon the Defendant's Motion for a Summary Judgment.

And the Court having considered the pleadings and admissions on file herein, and having heard the arguments

of counsel for the respective parties, and being of the opinion that said motion is well taken and should be sustained.

It is therefore hereby ordered and adjudged that said motion be and the same is hereby sustained; that the Second Amended Complaint herein be and the same is hereby finally dismissed with prejudice; and the Complainant, Interstate Realty Company, be and it is hereby taxed with all costs herein for which let execution issue.

Thus ordered and adjudged on this the 15th day of December, 1947.

(Signed) ALLEN COX,
Judge.

Ent. C O B-3, P-411.

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69 NOTICE OF APPEAL.

In the District Court of the United States for the Western Division of the Northern District of Mississippi.

Interstate Realty Company, Complainant

vs. No. 272-Civil.

J. S. Woods, Defendant.

Notice is hereby given that Interstate Realty Company, Complainant, hereby appeals to the Circuit Court of Ap-

Sealed and delivered in the presence of—

(Seal) INTERSTATE REALTY COMPANY.
(Signed) By PHIL STONE,
(Seal) Attorney.
(Seal) UNITED STATES FIDELITY AND GUARANTY COMPANY
(Signed) By CHAS. H. JOHNSTON,
(Charles H. Johnston)
Attorney-in-fact.

Filed this 6 day of Jan. 1948.

MOTION FOR EXTENSION OF TIME TO COMPLETE RECORD.

78 (Title Omitted.)

To Honorable Allen Cox, United States District Judge:

Comes Interstate Realty Company and requests an extension of time for the purpose of completing the Record on Appeal in this case and for grounds of said Motion says that the Court Reporter has been busy in reporting cases in this Court and has thus not been able to entirely complete the record in this case.

Respectfully submitted,
JAMES STONE & SONS,
(Sgd.) By PHIL STONE,
Attorneys for Complainant.

Oxford, Mississippi.

Certificate.

I, Phil Stone, of Counsel for Complainant, hereby certify that I have this day mailed, postage prepaid, a true copy of the foregoing Motion to Honorable John W. Kyle, Sardis, Mississippi; and to McClure & Fant, Sardis, Mississippi, Attorneys for Defendant, their usual post office addresses.

I further certify that said Attorneys for Defendant have no objection to the granting of said Motion.

Witness my signature at Oxford, Mississippi, this January 20, 1948.

JAMES STONE & SONS,
(Sgd.) By PHIL STONE,
(Phil Stone)
Of Counsel for Complainant.

Oxford, Mississippi.

Filed this 20 day of Jan. 1948.

ORDER GRANTING EXTENSION OF TIME FOR COMPLETION OF RECORD.

79 (Title Omitted.)

This day this cause came on to be heard upon the Motion of Complainant for extension of time in order to complete the Record in the above case, and it is hereby ordered that said time for completion of said Record be, and the same hereby is, extended until February 7, 1948.

Ordered and Adjudged this January 20, 1948.

(Sgd.) ALLEN COX,
U. S. District Judge.

Civ. O. B. #3-O-425.

peals for the Fifth Circuit from the Final Judgment entered in this action on December 15, 1947.

(Signed) L. C. ANDREWS,
(L. C. Andrews)

Oxford, Mississippi.

JAMES STONE & SONS,
(Signed) By PHIL STONE,
(Phil Stone)
Attorneys for Complainant.

Oxford, Mississippi.

Certificate.

I, Phil Stone, of Counsel for Complainant, do hereby certify that I have this day mailed to McClure and Fant, of Counsel for Defendant, a true copy of the above Notice of Appeal, postage prepaid, to their usual Post Office Address at Sardis, Mississippi.

This December 29, 1947.

(Signed) PHIL STONE,
(Phil Stone)
Of Counsel for Complainant.

Oxford, Mississippi.

Filed this 29 day of Dec. 1947.

STIPULATION FOR RECORD

(Title Omitted.)

It is hereby agreed by and between Attorneys for the Complainant and Attorneys for the Defendant that the Record on appeal shall consist of the following:

1. Second Amended Complaint, including all exhibits.

2. Answer of Defendant to Second Amended Complaint.

3. Request of Defendant for Admissions.

4. Reply of Complainant thereto.

5. Motion of Defendant for Summary Judgment.

6. Answer of Complainant thereto.

7. Opinion of the Court rendered December 15th, 1947, together with exceptions of Complainant thereto.

8. Order of Court dated December 15th, 1947.

9. Notice of Appeal.

10. Stipulation for Record.

11. Appeal Bond.

12. Certificate of U. S. District Clerk.

Witness the signatures of L. C. Andrews and James Stone & Sons, Attorneys for Complainant, this December 29, 1947.

(Signed) L. C. ANDREWS,
(L. C. Andrews)

Oxford, Mississippi.

JAMES STONE & SONS,
(Signed) By PHIL STONE,
(Phil Stone)
Attorneys for Complainant.

Oxford, Mississippi,

Witness the signatures of John W. Kyle and of McClure & Fant, Attorneys for Defendant, this December 31st, 1947.

(Signed) JOHN W. KYLE,
(John W. Kyle)

Sardis, Mississippi.

McCLURE & FANT,
(Signed) By HERBERT FANT,
(Herbert Fant)
Attorneys for Defendant.

Sardis, Mississippi.

Filed this 6 day of Jan. 1948.

72 BOND FOR COSTS.

(Title Omitted.)

Know All Men By These Presents; That Interstate Realty Company are held and firmly bound unto J. S. Woods, his executors, administrators, or assigns, in the sum of Five Hundred and no/100—dollars, lawful money of the United States of America, to be paid unto the said J. S. Wood, his executors, administrators, or assigns, to which payment well and truly to be made, we do bind and oblige our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seal and dated this 2nd day of January, A. D. 1948.

Whereas, the above-named Interstate Realty Company heretofore corporation of the State of Tennessee, commenced an action in the United States District Court, in and for the Northern District of Mississippi against the said J. S. Woods.

Now Therefore The Condition Of This Obligation is such that if the above-named Interstate Realty Company in the said action shall pay on demand, all costs that may be adjudged, or awarded against J. S. Wood as aforesaid in said action; then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

In the District Court of the United States for the Western Division of the Northern District of Mississippi.

I, HUBERT D. STEPHENS, Clerk of the United States District Court for the Western Division of the Northern District of Mississippi, do hereby certify that the foregoing 79 pages is a true and correct copy of portions of the record in the case of Interstate Realty Company, Complainant, vs. J. S. Woods, Defendant, stipulated by attorneys for the parties as the record in said cause on appeal thereof to the United States Circuit Court of Appeals, Fifth Circuit, together with the order of the District Judge extending time for filing the record on appeal.

Witness my signature and seal of office this 7th day of February, 1948.

(Seal)

HUBERT D. STEPHENS, JR.
Clerk, U.S. District Court.
By C. W. SMALLWOOD,
Deputy Clerk.

[fol. 81] That thereafter the following proceedings were had in said cause in the United States Court of Appeals for the Fifth Circuit, viz:

ARGUMENT AND SUBMISSION

Extract from the Minutes of May 24th, 1948

No. 12,255

INTERSTATE REALTY COMPANY

versus

J. S. WOODS

On this day this cause was called, and upon the request of counsel for appellant, the case was taken under submission upon the record and briefs filed, without oral argument.

[fol. 82] OPINION—Filed June 18, 1948

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 12255.

INTERSTATE REALTY COMPANY, Appellant,

versus

J. S. WOODS, Appellee

Appeal from the District Court of the United States for the Northern District of Mississippi

(June 18, 1948)

Before Sibley and Lee, Circuit Judges, and Christenberry, District Judge

Lee, Circuit Judge: This suit was filed by the appellant, a Tennessee corporation, to recover from appellee, a resident of Mississippi, a broker's commission alleged to be due on the sale of certain of appellee's real estate in the State of Mississippi. Appellee in his answer denied the right of appellant to recover, setting up that appellant was a

foreign corporation which, because it had never qualified to [fol. 83] do business in the State of Mississippi as provided by Mississippi law,[1] was not entitled to maintain any suit in any court in Mississippi. After filing his answer, the appellee called upon appellant to admit, pursuant to Rule 36, *Federal Rules of Civil Procedure*, that it had not qualified to do business in Mississippi. In response, appellant denied that it was doing business in Mississippi, but admitted a number of transactions in that State over a specified period of years. Upon this admission, the court below, on motion for summary judgment, found that appellant was doing business in Mississippi and held that the contract in question was void. Judgment was thereupon entered dismissing the plaintiff's suit with prejudice. This appeal followed.

The two questions involved are (1) Was appellant doing business in Mississippi within the purview of the statutes? And, (2) if so, was the contract with appellee which was entered into in Mississippi null and void because appellant at that time had not qualified to do business in Mississippi?

The record shows that appellant is a corporation organized under the laws of the State of Tennessee, with its domicile in Memphis, Tenn., and that it had never qualified to do business in Mississippi. Through its agents, however, it had contracted to sell real estate in Mississippi and in connection with sales had sent its agents into Mississippi to meet prospective buyers and to show the properties to be sold. Appellant admitted that in 1942 it earned from 3 sales in Mississippi $2,121.45; in 1943, from 2 sales, $4,064.25; in 1944, from 3 sales, $12,000; in 1945, [fol. 84] from 14 sales, $14,272.27; and in 1946, from 16 sales, $14,430.75. We think that in view of these admissions the court below was correct in holding that appellant was doing business in Mississippi within the meaning of the Mississippi statutes. *Marx & Bensdorf, Inc. v. First Joint Stock Land Bank of New Orleans*, 178 Miss. 345, 173 So. 297; *Wiley Electric Company v. Electric Storage Battery Company*, 167 Miss. 842, 147 So. 773.

The question remaining is whether or not appellant's failure to qualify to do business in Mississippi struck

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[1] Sections 5319, 5339, 5343, Mississippi Code 1942; Section 155, c. 137, Mississippi Laws 1944.

with nullity the contract sued upon in this case. The pertinent sections of the Mississippi law are set forth in the margin.[2]

[fol. 85] The court below rested its decision upon *Quartette Music Co. v. Haygood*, 108 Miss. 755, 67 So. 211, and held that under that case the contract here sued upon was null and void because at the time of contracting the appellant had not qualified to do business in the State of Mississippi. In so holding we think the court erred.

In the *Haygood* case the plaintiff was a Texas corporation and brought suit in the Circuit Court of Lee County, Miss., against J. L. Haygood and G. W. Long on a promissory note signed by them in the sum of $225. The defendants moved to dismiss, setting forth that the plaintiff was a foreign corporation and had not qualified to do business in Mississippi and that the note sued upon was the consideration for business done by the corporation in Mississippi.

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[2] "§5319. *Resident agent: how designated.*— * * *

"Every foreign corporation doing business in the state of Mississippi whether it has been domesticated or simply authorized to do business within the state of Mississippi, shall *file a written power of attorney* designating the secretary of state or in lieu thereof an agent as above provided in this section, upon whom service of process may be had in the event of any suit against said corporation; and any foreign corporation doing business in the state of Mississippi shall file such written power of attorney before it shall be domesticated or authorized to do business in this state, and the secretary of state shall be allowed such fees therefor as is [sic] herein provided for designating resident agents. Any foreign corporation failing to comply with the above provisions shall not be permitted to bring or maintain any action or suit in any of the courts of this state." (Emphasis ours.)

"§5339. *Foreign corporations may be domesticated.*— Every company or corporation incorporated under the laws of any other state, territory or country, now doing business in this state, or hereafter desiring to do business in this state, and desiring to become a domestic corporation in this state, may file with the governor of the state a copy of its charter, or articles of incorporation or association, or in case such company or corporation is incorporated merely by

Plaintiff demurred to the plea on the ground that the law referred to was unconstitutional and that the plea did not state sufficient grounds for a dismissal. The trial court overruled the demurrer and dismissed the plaintiff's suit, and the plaintiff appealed. The Supreme Court affirmed and, citing an earlier Mississippi case, said:

> "'Every contract made for, or about, any matter or thing which is prohibited and made unlawful by any statute, is a void contract, though the statute itself [fol. 86] does not mention that it shall be so, but only inflicts a penalty on the defaulter, because a penalty implies a prohibition, though there are no prohibitory words in the statute.'
>
> "There are some decisions in our books which apparently conflict with this rule, but they were all

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a certificate, then a copy of its certificate of incorporation, duly authenticated and certified under the great seal of the state in which it was incorporated by charter or certificate."

"§5343. *Charters to be filed.*—Every company or corporation for profit incorporated under or by virtue of the laws of any government, or of any other state or territory now or hereafter doing business in this state, shall file in the office of the secretary a copy of its charter or articles of incorporation, or in case such company or corporation is incorporated merely by certificate, then a copy of such certificate duly certified and authenticated. Said charters, articles of incorporation or certificates to be filed shall be duly certified by the president and secretary, or other chief executive of such corporation, and by attaching thereto the corporate seal, and the secretary of state, on the payment of the fees herein provided for shall give certificate that said corporation has filed its charter or articles of incorporation as required by this act, and any foreign corporation which shall not file a copy of its charter or certificate or articles of incorporation, as provided in this act, *shall be liable to a fine of not less than $100.00.* This section shall not apply to insurance companies, and is not to be taken or construed to change or modify the laws which are directly applicable to the character of corporations." (Emphasis ours.)

Section 155, c. 137, Mississippi Laws 1944, deals with local privilege taxes.

overruled by Woodson v. Hopkins, 85 Miss. 171, 37 So. 1000, 38 So. 298, 70 L. R. A. 645, 107 Am. St. Rep. 275."

The latest case called to our attention from the Mississippi Supreme Court on the subject is *Newell Construction Co. v. State Highway Commission*, 195 Miss. 395, 15 So. 2d 700. There the court said:

> "We are of the opinion that the court below was correct in holding that the appellant was doing business in this state and that there had been no substantial compliance with the statutes here involved until September 16, 1933, and that hence *the contract sued on is void and unenforcible.* Quartette Music Co. v. Haygood, 108 Miss. 755, 67 So. 211; Peterman Construction & Supply Company v. Blumenfeld, 156 Miss. 55, 125 So. 548; Wiley Electric Company v. Electric Storage Battery Company, 167 Miss. 842, 147 So. 773; Marx & Bensdorf, Inc. v. First Joint Stock Land Bank of New Orleans, 178 Miss. 345, 173 So. 297; Case v. Mills Novelty Company, 187 Miss. 673, 193 So. 625, 126 A. L. R. 1102." (Emphasis ours.)

Whether the court in using the word "void" meant absolutely null, or void in the sense of unenforceable, the opinion does not make clear. Citation of the *Haygood* case would indicate that the court was of the opinion that [fol. 87] the contract was absolutely null; but citation of the other cases, all of them opinions by the Supreme Court of Mississippi later in date than the *Haygood* case, would indicate that the court meant that the contract was "void" only in the sense that it was unenforceable[3] in the Mississippi courts.

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[3] The word "void" does not always imply entire nullity. In Black's *Law Dictionary*, 3rd ed., it is said: "Void seldom implies entire nullity; but is, in a legal sense, subject to large qualifications in view of all the circumstances calling for its application, and the rights and interests to be affected in a given case. [Citing cases.]"

In *Peterman Construction & Supply Co. v. Blumenfeld, supra*, the Supreme Court of Mississippi said:

> "* * * we think the case is controlled by Quartette Music Co. v. Haygood, supra, in which it is said that a contract made without first complying with the provisions of the above quoted statute could not be enforced in the courts of this state.
>
> "That is the policy of this state, and while this case appears to be hard, in that finally the foreign corporation did comply with the law, yet in so far as it affects this contract the compliance cannot be made to relate back to the date of its execution. It was either enforceable on the date of its execution, or unenforceable. Under the statute, as construed by this court, the contract was not enforceable on its execution, and when the one contract was signed it was, in effect, a volume of business already transacted amounting to 200 separate and distinct contracts, in so far as the relation created between the foreign corporation and the several subscribers is concerned. * * *"

[fol. 88] In *Wiley Electric Co. v. Electric Storage Battery Co., supra*, the Supreme Court of Mississippi said:

> "* * * This statute closes the doors of the courts of this state to foreign corporations doing business in this state in violation of its provisions, consequently upon the proof in this record we think the suit should have been dismissed."

In *Marx & Bensdorf, Inc. v. First Joint Stock Land Bank, supra*, the Supreme Court of Mississippi in referring to the statute used the following language:

> "* * * It will be noted that the last clause of that paragraph provides that any foreign corporation failing to comply therewith is barred from bringing and maintaining any suit in the courts of this state."

In *Case v. Mills Novelty Co., supra*, the Supreme Court of Mississippi said:

> "The servicing of this ice cream dispenser was purely a local transaction, not incidental to or necessary for the formation of the sales contract, and was

subject wholly to the supervision and control of the state. It necessarily follows therefore that when servicing this ice cream dispenser, which it did through an agent employed for that purpose, the appellee was doing business in this state, and the contract of which this service agreement is a part violated Section 4164, Code of 1930, and is unenforceable."

We think the cases cited in the *Newell Construction Co.* case, with the exception of the *Haygood* case, all indicate that under the Mississippi statutes the prohibition merely [fol. 89] closes the door of the State courts to a foreign corporation which has failed to qualify to do business in that State. That this is the true interpretation of the Mississippi law is made clear in *Long Beach Canning Co. v. Clark*, 1926, 141 Miss. 177, 106 So. 646, and *Citizens' Bank of Hattiesburg v. Grigsby*, 1934, 170 Miss. 655, 155 So. 684. In *Long Beach Canning Co. v. Clark, supra*, the Supreme Court of Mississppi said:

"* * * In Quartette Music Co. v. Haygood, 108 Miss. 755, 67 So. 211, it was held that a foreign corporation doing business in this state, which had not filed its charter as required by this section, could not enforce its obligations in the courts of this state.

* * * * * * * * * * * *

"The statute does not make a forfeiture of property to the state for the failure to record its charter. It simply refuses the aid of its courts to those doing business in violation of the law without recording their charter."

In *Citizens' Bank of Hattiesburg v. Grigsby, supra*, the Mississippi Supreme Court said:

"It is next contended that the contract was void, and that no validity can be given to the deed under the foreclosure. It will be noted, in considering this contention, that the Franklin Bond & Mortgage Company is not a party to the suit, is seeking no relief in court, and has sought none. The statute bearing on the matter denies, to a corporation violating the statute, access to the courts for any relief. We do not

think the statute avoids the contract so as to affect [fol. 90] third persons, and we are of the opinion that nobody can raise this question but the state of Mississippi, when suit is brought by third persons, or when the litigation is between other persons than the corporation violating the statute and the state of Mississippi. In other words, a sale under a deed of trust in pais passes the title from the trustee to the purchaser. In the original contract between the Franklin Bond & Mortgage Company and Williams, the title passed from Williams to the trustee. The language of the statute does not make the contract entirely void. See Middleton v. Georgetown Mercantile Company, 117 Miss. 134, 77 So. 956; Long Beach Canning Company v. Clark, 141 Miss. 177, 106 So. 646; Nicholson v. Myres (Miss.) 154 So. 282; Quitman County v. Stritze, 70 Miss. 320, 13 So. 36; and the authorities cited under these cases. See, also, Springfield Grocery Co. v. Devitt, 126 Miss. 169, 88 So. 497.

"In our opinion, the case of Long Beach Canning Co. v. Clark, supra, is applicable here. In that case it was held, where a foreign corporation did business in this state without filing its charter as required by section 935, Code 1906 (which is brought forward in the Code of 1930, section 4164), that this did not prevent it from selling property to liquidate its affairs on discontinuing its business, and that the statute prohibiting a foreign corporation from transacting business unless its charter was filed was intended only to deny such foreign corporation access to the courts of the state to enforce rights growing out of business transacted contrary to the statute. It would be too sweeping a decision to hold that the contract was utterly void as to third persons, and it would impose an un- [fol. 91] reasonable burden on other parties to compel them to see to it that a corporation had complied with the law of the state, when they desired to buy the property of such corporations."

When, therefore, the court in the *Newell* case used the words "void and unenforcible," we must interpret "void" as meaning that no relief could be granted to a noncomplying foreign corporation in view of the statute. Sup-

posing a Mississippi resident had sued a nonresident corporation in the Mississippi court for breach of contract, the contract having been entered into in Mississippi, would it be contended that the nonresident corporation could set up that since it had not qualified to do business in the State of Mississippi the contract entered into was void? We think not. The Mississippi statutes deny to the noncomplying corporation permission to bring a suit in the State courts; but they do not prevent such a corporation from being sued upon its contracts in the State courts.[4]

But the prohibition in the State law closing the doors of the State courts extends no further than the State courts. The State of Mississippi is without authority to limit or extend the jurisdiction of the federal courts. If diversity of citizenship exists, the fact that a foreign corporation may not sue in the State courts because it has not complied with the conditions of doing business within the State does not shut the doors of the federal court sitting in that State. See *David Lupton's Sons Co. v.* [fol. 92] *Automobile Club of America,*[5] 225 U. S. 489, 32 S. Ct. 711, 56 L. Ed. 1177; *McLean v. York Oil Field Supply Co., Inc.*, 5 CCA, 138 F. 2d 804; *Butler Bros. Shoe Co. v. U. S. Rubber Co.*, 156 F. 1; *Groton Bridge & Mfg. Co. v. Amer. Bridge Co.*, 151 F. 871, 876-877.

We therefore hold that the appellant has the right to sue on its contract in the federal District Court sitting in Mississippi.

The judgment appealed from is

Reversed.

A True copy. Test:

——— ———, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

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[4] The statute reads: "Any foreign corporation failing to comply with the above provisions shall not be permitted to bring or maintain any action or suit in any of the courts of the state." See *Citizens' Bank v. Grigsby, supra.*

[5] This case is almost on all fours with the one now before the court and went up on the question of whether the New York law (which is like the Mississippi law) made the contract void or only unenforceable. Held: Unenforceable, hence the federal court had jurisdiction.

[fol. 93]

JUDGMENT

Extract from the Minutes of June 18th, 1948

No. 12,259

INTERSTATE REALTY COMPANY

versus

J. S. WOODS

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Mississippi, and was taken under submission by the Court on the record and briefs on file;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby reversed;

It is further ordered and adjudged that the appellee, J. S. Woods, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

[fols. 94-99] PETITION FOR REHEARING—Filed 9/24/48

UNITED STATES CIRCUIT COURT OF APPEALS,
FIFTH CIRCUIT.

No. 12,259.

INTERSTATE REALTY COMPANY,
Appellant,

versus

J. S. WOODS,
Appellee.

PETITION FOR REHEARING BY APPELLEE.

Comes J. S. Woods, appellee in the above entitled case, and shows unto the court that upon the 18th day of June, 1948, this court rendered a judgment reversing the judgment rendered in the District Court of the United States for the Northern District of Mississippi, dismissing the suit of Interstate Realty Company v. J. S. Woods to recover a broker's commission. The case is reported "*Interstate Realty Co. v. Woods*", 168 Fed. (2d) 701. The appellant was a foreign corporation, which, according to

the decision of this court, was transacting business in the State of Mississippi without qualifying. This court held that since the contract sued upon was not absolutely void, it was merely unenforceable in the State Court, but by reason of diversity of citizenship the suit might be maintained in the Federal Court. Accordingly, the court reversed the decision of the District Court and held that suit might be maintained in the United States District Court, using the following language:

> "But the prohibition in the State law closing the doors of the State courts extends no further than the State courts. The State of Mississippi is without authority to limit or extend the jurisdiction of the federal courts. If diversity of citizenship exists, the fact that a foreign corporation may not sue in the State courts because it has not complied with the conditions of doing business within the State does not shut the doors of the federal court sitting in that State. See David Lupton's Sons Co. v. Automobile Club of America, 225 U. S. 489, 32 S. Ct. 711, 56 L. Ed. 1177, Ann. Cas. 1914A, 699; McLean v. York Oil Field Supply Co., Inc., 5 Cir. 138 F. 2d 804; Butler Bros. Shoe Co. v. U. S. Rubber Co., 8 Cir., 156 F. 1; Groton Bridge & Mfg. Co. v. Amer. Bridge Co., C. C. N. Y., 151 F. 871, 876, 877.
>
> "We therefore hold that the appellant has the right to sue on its contract in the federal District Court sitting in Mississippi.
>
> "The judgment appealed from is reversed."

The decision of this court was based upon the case of *David Lupton's Sons Co. v. Automobile Club of America*, 225 U. S. 489, 56 L. Ed. 1177. Appellee's counsel inad-

vertently failed to call the attention of the court to the fact that the *David Lupton* case was overruled by the Supreme Court of the United States in the case of *Dr. Furman Angel v. W. H. Bullington*, 330 U. S. 183, 91 L. Ed. 832. In that case a North Carolina statute prohibited a suit for recovery on a deficiency judgment. A suit filed in the state court thereupon was dismissed, whereupon, the plaintiff filed suit in the United States District Court upon the theory that the contract was not void but that the same was merely unenforceable in a North Carolina Court. The appellant, plaintiff, based its right to recover in the Federal Court on diversity of citizenship, relying upon the *Lupton* case. The Supreme Court of the United States held, in the last mentioned case, that no suit could be maintained in the Federal Court based upon diversity of citizenship, unless the suit could be maintained in the State Court, and in doing so, overruled the *Lupton* case. The court used the following language:

> "Cases Like David Lupton's Sons Co. v. Automobile Club, 225 U. S. 489, 56 L. ed. 1177, 32 S. Ct. 711, Ann. Cas. 1914A 699, are obsolete insofar as they are based on a view of diversity jurisdiction which came to an end with Erie R. Co. v. Tompkins, 304 U. S. 64, 82 L. ed. 1188, 58 S. Ct. 817, 114 A. L. R. 1487. That decision drastically limited the power of federal district courts to entertain suits in diversity cases that could not be brought in the respective State courts or were barred by defenses controlling in the State courts. Compare Suydam v. Broadnax, 14 Pet. (US) 67, 75, 10 L. ed. 357, 361. Of course, where resort is had to a federal court not on grounds of diversity of citizenship but because a federal right is claimed, the limitations upon the courts of a State do not con-

trol a federal court sitting in the State. Holmberg v. Armbrecht, 327 U. S. 392, 90 L. ed. 743, 66 S. Ct. 582, 162 A. L. R. 719."

Mr. Justice Rutledge, in his dissenting opinion, conceded that the decision of the court had the effect of overruling the *Lupton* case. The court used the following language:

"From the Court's opinion I cannot say whether the question has been resolved. Its discussion of North Carolina's 'policy' and its overruling of the David Lupton's Sons Case (US) supra, would seem to indicate that it is applying York, though without saying so frankly. But, if so, why speak also of res adjudicata? The law should not be made into such a merry-go-round. Bullington is entitled to one full day in court on the substance of his claim. This he has not had."

The doctrine announced in the case of *Angel v. Bullington* rests upon the rule announced in the case of *Erie R. Co. v. Tompkins*, 304 U. S. 64, 82 L. ed. 1188, 114 A. L. R. 1487, and the case of *Guaranty Trust Company of New York v. York*, 326 U. S. 99, 160 A. L. R. 1231, from which cases it, necessarily, appears that the decision of this court in the instant case was erroneous and a rehearing should be granted.

Counsel for the appellee may be excused for not citing the *Angel* case because the published volume of L. Ed. of the Supreme Court of the United States, used by lawyers in Mississippi, had not been published and the decision could only have been obtained from the Advance Sheets,

and we take it that it is pardonable for counsel practicing law in Mississippi to fail to read each and every Advance Sheet by the Supreme Court of the United States.

Unless the court should grant a rehearing and set the judgment aside, affirming the judgment of the District Court, it will be necessary to go to the inconvenience, trouble and expense of trying the case on the merits before the District Judge, in a case where, admittedly, the United States District Court of the Northern District of Mississippi was and is without jurisdiction.

Wherefore, the appellee moves the court to set aside the judgment of reversal rendered in this case, as aforesaid, and render a judgment of affirmance.

JOHN W. KYLE,
Sardis, Mississippi,

JAMES McCLURE,
Sardis, Mississippi,

WILLIAM H. WATKINS,
Jackson, Mississippi,

P. H. EAGER, JR.,
Jackson, Mississippi,

THOMAS H. WATKINS,
Jackson, Mississippi,
Attorneys for Appellee.

I, William H. Watkins, of counsel for appellee in the above entitled case, certify that I have this day sent by United States Mail, postage prepaid, to L. C. Andrews, Oxford, Mississippi, and James Stone & Sons, Oxford, Mississippi, attorneys for appellant in the above entitled case, a true and correct copy of the foregoing petition for rehearing.

This, the 22nd day of September, 1948.

WILLIAM H. WATKINS,
Of Counsel.

[fol. 100] ORDER GRANTING APPELLEE LEAVE TO FILE A PETITION FOR REHEARING

Extract from the Minutes of September 29th, 1948

No. 12,259

INTERSTATE REALTY COMPANY

versus

J. S. WOODS

Under direction of Honorable Elmo P. Lee, United States Circuit Judge, acting pursuant to Rule 29 of this Court, it is ordered that appellee be, and he is hereby granted leave to file a petition for rehearing as of September 24, 1948, in the above entitled and numbered cause.

[fol. 101] ORDER GRANTING LEAVE TO FILE PETITION FOR REHEARING—Filed October 22, 1948

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 12,259

INTERSTATE REALTY COMPANY, Appellant,

versus

J. S. WOODS, Appellee

Appeal from the District Court of the United States for the Northern District of Mississippi

(October 22, 1948)

On Petition for Rehearing

Before Sibley and Lee, Circuit Judges, and Christenberry, District Judge

PER CURIAM:

A rehearing is granted restricted to the question whether, in a diversity case, the doors of the federal court sitting in Mississippi are shut to a foreign corporation which may

not sue in the state court because it has not complied with the condition for doing business within the state, the rehearing to be submitted upon briefs previously filed and to be filed on or before November 15, 1948.

[fol. 102] OPINION AND DECREE REAFFIRMED, ON REHEARING NOVEMBER 26, 1948

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 12259

INTERSTATE REALTY COMPANY, Appellant,

versus

J. S. WOODS, Appellee

Appeal from the District Court of the United States for the Northern District of Mississippi

(November 26, 1948)

On Rehearing

Before Sibley and Lee, Circuit Judges, and Christenberry, District Judge

Per CURIAM:

In our original opinion we held that the contract sued upon was not absolutely void but merely unenforceable in the State court and that by reason of diversity of citizenship the suit may be maintained in the federal court. On appli- [fol. 103] cation for rehearing, the appellee cited the case of *Angel v. Bullington*, 330 U. S. 183, as overruling the case of *David Lupton's Sons Co. vs. Automobile Club of America*, 225 U. S. 489, 32 S. Ct. 711, 56 L. Ed. 1177, upon which reliance was placed by us to sustain jurisdiction in the federal court. Accordingly, we granted a rehearing, restricted in its application to the question whether a foreign corporation might sue in the federal court when the doors of the State courts were closed to it because it had not complied with the conditions for doing business within the State.

The Supreme Court in the *Bullington* case was concerned with the application of the doctrine of *res adjudicata* under a North Carolina statute prohibiting a suit for recovery on a deficiency judgment. What was said in that case about cases like *David Lupton's Sons Co. v. Automobile Club* was argumentatory. We do not consider it to have overruled the *David Lupton's Sons Co.* case upon the question with which we are now concerned and with respect to which the *David Lupton's Sons Co.* case expressly dealt.

Entertaining as we do this view, our original opinion and decree reversing the judgment appealed from are reaffirmed in their entirety and made the judgment of the court on rehearing.

A True copy. Tehste:

—— ——, Clerk of the United States Court of Appeals for the Fifth Circuit.

[fol. 104] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 105] Supreme Court of the United States

Order Allowing Certiorari—Filed February 7, 1949

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No.

J. S. WOODS,

Petitioner,

v.

INTERSTATE REALTY COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI WITH BRIEF THEREUPON TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

William H. Watkins

Attorney for Petitioner

Jesse W. Watkins

Of Counsel

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No.

J. S. WOODS,

Petitioner,

vs.

INTERSTATE REALTY COMPANY,

Respondent

PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Jurisdictional Statement

The jurisdiction of this Honorable Court is invoked under New Title 28, United States Code, Judiciary and Judicial Procedure, Sections 1254, 1331, 1332 and 2101, together with Rule 38, 5(b) of this Court.

Time for applying for certiorari to Supreme Court of the United States begins from the date of the overruling of motion for rehearing. *Gypsy Oil Co.* v. *Escoe*, 275 U. S. 498, 72 L. Ed. 393; *U. S.* v. *Seminole Nation*, 299 U. S. 417, 81 L. Ed. 316; *Department of Banking, State of Nebraska* v. *Pink*, 317 U. S. 264, 87 L. Ed. 254, rehearing denied, 318

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Summary Statement of Matters Involved

Petitioner, J. S. Woods, by his counsel, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals, Fifth Circuit, rendered November 28, 1948, in an action entitled "Interstate Realty Company, Appellant, *v.* J. S. Woods, Appellee," No. 12,259, reversing an order (Tr. 72) [1] of the District Court of the United States for the Northern District of Mississippi in favor of petitioner.

The respondent, a Tennessee corporation, exhibited its complaint in the United States District Court for the Northern District of Mississippi, against the petitioner, an adult resident of such district where the suit was filed (Tr. 1). The suit was brought to recover from the petitioner alleged commissions for the sale of real estate; the amount involved, exclusive of interest and costs, exceeded $3,000.00. The petitioner, in answer to the complaint, alleged that the respondent, a foreign corporation, without becoming domesticated and without qualifying to do business in the State of Mississippi, transacted business in the state, out of which transactions the suit was brought, and that, therefore, the respondent could not enter into an enforceable contract in the State of Mississippi, and was not entitled to maintain any suit in any court therein (Tr. 56). The relevant Mississippi statutes regulating the right of a foreign corporation to transact business in the state, and the re-

[1] References are to Transcript of Record, United States Court of Appeals.

quirement that it procure a license, with penalty for failure so to do, will be found, Section 5319, Mississippi 1942 Code, *Appendix "A"* hereto; Section 5339, Mississippi 1942 Code, *Appendix "B"* hereto; Section 5343, Mississippi 1942 Code, *Appendix "C"* hereto; Section 5344, Mississippi 1942 Code, *Appendix "D"* hereto; Section 155, Chapter 137, Mississippi Laws of 1944, *Appendix "E"* hereto; Section 224, Chapter 137, Mississippi Laws of 1944, *Appendix "F"* hereto.

The petitioner requested of the respondent admission of certain facts (Tr. 61-63) based upon statements contained in the pleadings and admissions of record. Petitioner moved for a summary judgment (Tr. 67). The District Judge held that the respondent was engaged in business in the State of Mississippi and that, therefore, the contracts sued upon were utterly void; that no suit could be maintained and that the same were not enforceable (Tr. 70-72). Accordingly, a motion for summary judgment on the part of petitioner was granted and judgment entered dismissing the complaint (Tr. 72). An appeal was taken to the United States Court of Appeals, Fifth Circuit, and the case will be found reported "Interstate Realty Co. *v.* Woods", 168 Fed. (2d) 701. That court held that under the laws and statutes of the State of Mississippi the contracts sued upon were not absolutely void but unenforceable in the state court. Accordingly, the court reversed the decision of the District Court and held that suit might be maintained in the United States District Court, using the following language:

> "But the prohibition in the State law closing the doors of the State courts extends no further than the State courts. The State of Mississippi is without authority to limit or extend the jurisdiction of the federal courts. If diversity of citizenship exists, the fact that

a foreign corporation may not sue in the State courts because it has not complied with the conditions of doing business within the State does not shut the doors of the federal court sitting in that State. See David Lupton's Sons Co. *v.* Automobile Club of America, 225 U. S. 489, 32 S. Ct. 711, 56 L. Ed. 1177, Ann. Cas. 1914A, 699; McLean *v.* York Oil Field Supply Co., Inc., 5 Cir., 138 F. 2d 804; Butler Bros. Shoe Co. *v.* U. S. Rubber Co., 8 Cir., 156 F. 1; Groton Bridge & Mfg. Co. *v.* Amer. Bridge Co., C. C. N. Y., 151 F. 871, 876, 877.

"We therefore hold that the appellant has the right to sue on its contract in the federal District Court sitting in Mississippi.

"The judgment appealed from is reversed."

A copy of the opinion of the United States Court of Appeals, Fifth Circuit, in the instant case, is made *Appendix "G"* hereto. The petitioner filed a petition for rehearing, which was granted, a copy of which order is attached as *Appendix "H"* hereto (Tr. —), and upon reconsideration of the case, the court adhered to its former opinion, copy of which opinion is made *Appendix "I"* hereto (Tr. —). The judgment of the United States Court of Appeals, Fifth Circuit, reversing the judgment of the District Court of the United States for the Northern District of Mississippi, will be found (Tr. —).

Questions Presented

The questions presented are as follows:

1. As to whether or not the respondent, a foreign corporation, might recover in the United States District Court for the Northern District of Mississippi, against petitioner on contracts entered into in the State of Mississippi by transacting business therein without complying with the statutes of the State of Mississippi made a condition precedent to the transaction of business in the state by a foreign corporation,

and upon failure to obtain the privilege license required by law before transacting such business, whether the violation of such statutes rendered the contracts totally void or merely unenforceable in the state court.

2. As to whether or not the United States Court of Appeals for the Fifth Circuit committed error in holding that since the contracts involved were merely unenforceable in the state court that suit might be maintained in the District Court of the United States.

3. As to whether or not recovery may be had in the Federal Court upon a cause of action created in the State of Mississippi in violation of the statutes and public policy of the state which contracts are unenforceable in the state courts.

Reasons Relied On for Allowance of the Writ

Reason I: The United States Court of Appeals has decided a federal question in conflict with applicable decisions of this court. A suit may not be maintained in the Federal Court upon a cause of action which is not enforceable in the State Court because it is in violation of the statutes and public policy of the state. *Dr. Furman Angel* v. *Bullington*, 330 U. S. 183, 91 L. Ed. 832; *Erie Railroad Company* v. *Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, 114 A. L. R. 1487; *John G. Ruhlin* v. *New York Life Insurance Company*, 304 U. S. 202, 82 L. Ed. 1290; *Guaranty Trust Company* v. *York*, 326 U. S. 99, 89 L. Ed. 2079, 160 A. L. R. 1231; *Cities Service Oil Company* v. *Dunlap*, 308 U. S. 208, 84 L. Ed. 196; *Palmer* v. *Hoffman*, 318 U. S. 109, 87 L. Ed. 645, 144 A. L. R. 719; *Griffin* v. *McCoach*, 313 U. S. 498, 85 L. Ed. 1481, 134 A. L. R. 1462; *Klaxton Company* v. *Stentor Electric Manufacturing Company, Inc.*, 313 U. S. 487, 85 L. Ed. 1488, 160.

Reason II: The United States Court of Appeals has decided an important question of a local nature in a way which is in conflict with applicable local decisions, in that it has decided that the contract of a foreign corporation made in the state without qualifying under the laws thereof was merely unenforceable and that suit might be maintained thereon in the Federal Court. *Newell Contracting Co.* v. *State Highway Commission*, 195 Miss. 395, 15 So. (2d) 700; *Quartette Music Co.* v. *Haygood*, 108 Miss. 755, 67 So. 211; *Bohn* v. *Lowry*, 77 Miss. 424, 27 So. 604; *Stamps* v. *Frost*, 174 Miss. 325, 164 So. 584; *Grapico Bottling Co.* v. *Ennis*, 140 Miss. 502, 106 So. 97; *Marx & Bensdorf* v. *First Joint Stock Land Bank of New Orleans*, 178 Miss. 345, 173 So. 297; *Case* v. *Mills Novelty Co.*, 187 Miss. 673, 193 So. 625, wherein it is held by the Supreme Court of Mississippi that contracts entered into are void and unenforceable.

Reason III: And for other reasons appearing to be assigned at the hearing.

Petitioner attaches to this petition a certified copy of the transcript of the record of the United States Court of Appeals and upon a presentation of the petition will furnish ten copies of the record as printed in the United States Court of Appeals, Fifth Circuit, with proceedings and opinions in that court.

Wherefore, petitioner prays for a writ of certiorari from this Honorable Court directed to the United States Court of Appeals for the Fifth Circuit, commanding that court to certify and send to this court for its review and determination, on a day named therein, a full and complete transcript of the record and all of the proceedings in the case of *Interstate Realty Company* v. *J. S. Woods*, No. 12,259, on the docket of the court, and that the judgment of said

court may be reversed, the judgment of the United States District Court affirmed, and petitioner afforded appropriate relief.

WILLIAM H. WATKINS,
Jackson, Mississippi;
JAMES MCCLURE,
Sardis, Mississippi;
JOHN W. KYLE,
Sardis, Mississippi;
P. H. EAGER, JR.,
Jackson, Mississippi;
THOMAS H. WATKINS,
Jackson, Mississippi,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No.

J. S. WOODS,

Petitioner,

vs.

INTERSTATE REALTY COMPANY,

Respondent

BRIEF FOR PETITIONER

Opinions Below

The opinion of the District Judge is not officially reported but is printed tr. 70. The opinion of the Court of Appeals filed June 18, 1948 is reported *Interstate Realty Company* v. *Woods*, 168 Fed. 2d 701, is in the record at page — and is made Appendix 8 to this brief. The opinion of the Court of Appeals filed November 26, 1948 is in the record at page — and is made Appendix — to this brief.

Basis for Jurisdiction

The statement showing the grounds upon which jurisdiction of this court is invoked is set forth at page 1 of

the foregoing petition and is by reference adopted as a part of this brief.

Statutes Involved

(A) This case involves a construction of Section 725, Title 28, U. S. C. A., containing the following language:

> "The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

(B) Section 5319, Mississippi 1942 Code, made Appendix 1 to this brief.

(C) Section 5339, Mississippi Code of 1942, made Appendix 2 to this brief.

(D) Section 5343, Mississippi Code of 1942, made Appendix 3 to this brief.

(E) Section 5344, Mississippi Code of 1942, made Appendix 4 to this brief.

(F) Section 155, Chapter 137, Mississippi Laws of 1944 made Appendix 5 to this brief.

(G) Section 224, Chapter 137, Mississippi Laws of 1944 made Appendix 6 to this brief.

Statement

The material facts have been set forth in the summary statement at pages 1, et seq. of the preceding petition and such statement is by reference adopted as part of this brief.

ARGUMENT

Point I

The United States Court of Appeals has decided an important question of Federal law contrary to applicable decisions of this Court.

The United States Court of Appeals in this case has decided that a foreign corporation transacting business in the State of Mississippi without qualifying as provided by law may maintain suit in the Federal Court upon a cause of action arising out of such business although under the laws of the State of Mississippi such contracts are void and unenforceable and suit may not be prosecuted thereupon. There is some confusion in the decisions of the Supreme Court of Mississippi as to whether such a contract is absolutely null and void or merely unenforceable. In the instant case, 168 Fed. (2d) 701, at Page 703, the Court of Appeals used the following language:

> "Whether the court in using the word 'void' meant absolutely null, or void in the sense of unenforceable, the opinion does not make clear. Citation of the Haygood case would indicate that the court was of the opinion that the contract was absolutely null; but citation of the other cases, all of them opinions by the Supreme Court of Mississippi later in date than the Haygood case, would indicate that the court meant that the contract was 'void' only in the sense that it was unenforceable in the Mississippi courts."

Section 5319, Mississippi 1942 Code, Appendix "A" hereto, provides that every foreign corporation before doing business in the state shall appoint an agent upon whom service of process may be had, and that any foreign corporation failing to comply with this provision shall not

be permitted to bring or maintain any action or suit in any of the courts of the state.

Section 5339, Mississippi 1942 Code, Appendix "B" hereto, provides how a foreign corporation may become domesticated.

Section 5343, Mississippi 1942 Code, Appendix "C" hereto, prohibits any corporation from transacting business in the state without compliance with the statute by filing a duly certified copy of its articles of incorporation, etc., and the act provides for a fine of $100.00 for violation of the act.

Section 5344, Mississippi 1942 Code, Appendix "D" hereto, contains the following language:

> "And the acts of the agents of any such foreign corporation shall have the same force and validity as the acts of agents of private persons; but such foreign corporations shall not do or commit any act in this state contrary to the laws or policy thereof, and shall not be allowed to recover on any contract made in violation of law or public policy."

Section 155, Chapter 137, Mississippi Laws of 1944, Appendix "E" hereto, requires any person or corporation negotiating sales of real estate in Mississippi, as a condition precedent thereto, to acquire a privilege license by the payment of a tax under the act.

Section 224, Chapter 137, Mississippi Laws of 1944, being Appendix "F" hereto, provides that any person, firm or corporation, violating the act will be guilty of a misdemeanor and shall be imprisoned in the county jail, not exceeding six months or fined not more than $500.00.

In the case of *Quartette Music Co.* v. *Haygood*, 108 Miss. 755, 67 So. 211, in determining the question involved here, the court used the following language:

> "A long line of decisions of this court support the judgment of the learned trial judge.

"Section 935, Code of 1906, provides that:

"'Every . . . corporation for profit incorporated under or by virtue of the laws of . . . any other state . . . . shall file in the office of the secretary of state a copy of its charter of incorporation.'

"The statute further provides that:

"Any 'foreign corporation which shall not file a copy of its charter or certificate or articles of incorporation . . . shall be liable to a fine of not less than one hundred dollars.'

"In Bohn *v.* Lowery, 77 Miss. 427, 27 So. 605, this rule is approved:

"'Every contract made for, or about, any matter or thing which is prohibited and made unlawful by any statute, is a void contract though the statute itself does not mention that it shall be so, but only inflicts a prohibition, though there are no prohibitory words in the statute.'

"There are some decisions in our books which apparently conflict with this rule, but they were all overruled by Woodson *v.* Hopkins, 85 Miss. 171, 37 So. 1000, 38 So. 298, 70 L. R. A. 645, 107 Am. St. Rep. 275."

The court expressly approved the case of *Bohn* v. *Lowery*, 77 Miss. 427, 27 So. 605, in which case a physician practiced medicine in the state without procuring a license which failure was punishable as a misdemeanor.

The latest case in the Supreme Court of Mississippi dealing with the subject matter is *Newell Contracting Co.* v. *State Highway Commission*, 195 Miss. 395, 15 So. (2d) 700, where the court said:

"We are of the opinion that the court below was correct in holding that the appellant was doing business in this state and that there had been no substantial compliance with the statutes here involved until Sep-

tember 16, 1933, and that hence the contract sued on is void and unenforcible. Quartette Music Co. *v.* Haygood, 108 Miss. 755, 67 So. 211; Peterman Construction & Supply Co. *v.* Blumenfeld, 156 Miss. 55, 125 So. 548; Wiley Electric Co. *v.* Electric Storage Battery Co., 167 Miss. 842, 147 So. 773; Marx & Bensdorf, Inc. *v.* First Joint Stock Land Bank of New Orleans, 178 Miss. 345, 173 So. 297; Case *v.* Mills Novelty Co., 187 Miss. 673, 193 So. 625, 126 A. L. R. 1102."

In the case of *David Lupton's Sons Co.* v. *Automobile Club of America*, 225 U. S. 489, 56 L. Ed. 1177, Ann. Cas. 1914A, this Court held that a similar prohibition appearing in a New York statute extended no further than the state court, and that such foreign corporation, though it had not complied with the conditions of doing business, might sue in the Federal Court sitting in the state. This case was followed in the cases of *Industrial Finance Corporation* v. *Community Finance Co.* (5th Cir.), 294 Fed. 870, and *Brace* v. *Gauger-Korsmo Const. Co. et al.* (8th Cir.), 36 Fed (2d) 661. The court in the instant case held that the contracts made by the respondent were not absolutely void but merely unenforceable in the state court but that respondent had access to the Federal Court sitting in the state, citing what is known as the *Lupton* case. The court used the following language:

"But the prohibition in the State law closing the doors of the State courts extends no further than the State courts. The State of Mississippi is without authority to limit or extend the jurisdiction of the federal courts. If diversity of citizenship exists, the fact that a foreign corporation may not sue in the State courts because it has not complied with the conditions of doing business within the State does not shut the doors of the federal court sitting in that State. See David Lupton's Sons Co. *v.* Automobile Club of America, 225 U. S. 489, 32 S. Ct. 711, 56 L. Ed. 1177,

Ann. Cas. 1914A 699; McLean *v.* York Oil Field Supply Co., Inc., 5 Cir., 138 F. 2d 804; Butler Bros. Shoe Co. *v.* U. S. Rubber Co., 8 Cir., 156 F. 1; Groton Bridge & Mfg. Co. *v.* Amer. Bridge Co., C. C. N. Y., 151 F. 871, 876, 877.

"We therefore hold that the appellant has the right to sue on its contract in the federal District Court sitting in Mississippi.

"The judgment appealed from is reversed."

The question involved, however, requires a statement of the development of the law resulting in the rule announced in the case of *Angel* v. *Bullington*, 330 U. S. 183, 91 L. Ed. 832.

U. S. C. A., Title 28, Section 725, contains the following language:

"The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

Beginning with the case of *Swift* v. *Tyson*, 16 Pet. 1, 18, 10 L. Ed. 865, 871, the court held that the foregoing section applied only to statutes of the state, but that the Federal court sitting in a state was at liberty to investigate and determine the common law for itself. This rule prevailed for many years, and until the decision of the court in *Erie Railroad Company* v. *Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, 114 A. L. R. 1487. There, a cause of action in tort which arose in the State of Pennsylvania was the subject of suit in the State of New York, and following the case of *Swift* v. *Tyson*, the District Court of New York held that the common law of the forum would control. This Court reversed the decision of the Second Circuit, and in so doing held that there was no general common law of the Federal

courts, but that the common law of the state should be applied. The court used the following language:

> "Experience in applying the doctrine of Swift *v.* Tyson, had revealed its defects, political and social; and the benefits expected to flow from the rule did not accrue. Persistence of state courts in their own opinions on questions of common law prevented uniformity; and the impossibility of discovering a satisfactory line of demarcation between the province of general law and that of local law developed a new well of uncertainties.
>
> "On the other hand, the mischievous results of the doctrine had become apparent. Diversity of citizenship jurisdiction was conferred in order to prevent apprehended discrimination in state courts against those not citizens of the State. Swift *v.* Tyson introduced grave discrimination by non-citizens against citizens. It made rights enjoyed under the unwritten 'general law' vary according to whether enforcement was sought in the state or in the federal court; and the privilege of selecting the court in which the right should be determined was conferred upon the non-citizen. Thus, the doctrine rendered impossible equal protection of the law. In attempting to promote uniformity of law throughout the United States, the doctrine had prevented uniformity in the administration of the law of the State. * * *"

See also *John G. Ruhlin* v. *New York Life Insurance Company,* 304 U. S. 202, 82 L. Ed. 1290.

The question was again reviewed in the case of *Guaranty Trust Company* v. *York,* 326 U. S. 99, 89 L. Ed. 2079, 160 A. L. R. 1231. In that case, a suit in equity was filed in the United States District Court for the State of New York by the respondent, York. The position taken in the suit was that, since the cause of action was one in equity, the six-year statute of limitations pled by the petitioner in bar of the action was not applicable; that, upon the other hand, the

question of the statute of limitations was a remedial matter of procedure, and that since the respondent had no adequate remedy at law, but had the right to go into a court of equity, it was asserted that the New York statute of limitations would not be applicable. The Supreme Court of the United States reversed the decision of the Second Circuit, and used the following language:

> "Matters of 'substance' and matters of 'procedure' are much talked about in the books as though they defined a great divide cutting across the whole domain of law. But, of course, 'substance' and 'procedure' are the same key-words to very different problems. Neither 'substance' nor 'procedure' represents the same invariants. Each implies different variables depending upon the particular problem for which it is used. See Home Ins. Co. *v.* Dick, 281 U. S. 397, 409, 74 L. Ed. 926, 934, 50 S. Ct. 338, 74 A. L. R. 701. And the different problems are only distantly related at best, for the terms are in common use in connection with situations turning on such different considerations as those that are relevant to questions pertaining to ex post facto legislation, the impairment of the obligations of contract, the enforcement of federal rights in the State courts and the multitudinous phases of the conflict of laws. See, e. g., American R. Exp. Co. *v.* Levee, 263 U. S. 19, 21, 68 L. Ed. 140, 143, 44 S. Ct. 11; Davis *v.* Wechsler, 263 U. S. 22, 24, 25, 68 L. Ed. 143, 145, 146, 44 S. Ct. 13; W. B. Worthen Co. *v.* Kavanaugh, 295 U. S. 56, 60, 79 L. Ed. 1298, 1301, 55 S. Ct. 555, 97 A. L. R. 905; Garrett *v.* Moore McCormack Co., 317 U. S. 239, 248, 249, 87 L. Ed. 239, 245, 246, 63 S. Ct. 246; and see Tunks, Categorization and Federalism: 'Substance' and 'Procedure' After Erie Railroad *v.* Tompkins (1939), 34 Ill. L. Rev. 271, 274-276; Cook, Logical and Legal Bases of Conflict of Laws (1942), 163-165.
>
> "Here we are dealing with a right to recover derived not from the United States but from one of the States. When, because the plaintiff happens to be a nonresi-

dent, such a right is enforceable in a federal as well as in a State court, the forms and mode of enforcing the right may at times, naturally enough, vary because the two judicial systems are not identic. But since a federal court adjudicating a State-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the State, it cannot afford recovery if the right to recover is made unavailable by the State nor can it substantially affect the enforcement of the right as given by the State.

"And so, putting to one side abstractions regarding 'substance' and 'procedure', we have held that in diversity cases the federal courts must follow the law of the State as to burden of proof. Cities Serv. Oil Co. *v.* Dunlap, 308 U. S. 208, 84 L. Ed. 196, 60 S. Ct. 201, as to conflict of laws, Klaxon Co. *v.* Stentor Electric Mfg. Co., 313 U. S. 487, 85 L. Ed. 1477, 61 S. Ct. 1020, as to contributory negligence, Palmer *v.* Hoffman, 318 U. S. 109, 117, 87 L. Ed. 645, 651, 63 S. Ct. 477, 144 A. L. R. 719. And see Sampson *v.* Channell, 110 F. 2d 754. Erie R. Co. *v.* Tompkins has been applied with an eye alert to essentials in avoiding disregard of State law in diversity cases in the federal courts. A policy so important to our federalism must be kept free from entanglements with analytical or terminological niceties."

The Court also used the following language:

"Diversity jurisdiction is founded on assurance to non-resident litigants of courts free from susceptibility to potential local bias. The Framers of the Constitution, according to Marshall, entertained 'apprehensions' lest distant suitors be subjected to local bias in State courts, or, at least, viewed with 'indulgence the possible fears and apprehensions' of such suitors. Bank of the United States *v.* Deveaux, 5 Cranch (US) 61, 87, 3 L. Ed. 38, 44. And so Congress afforded out-of-State litigants another tribunal, not another body of law. The operation of a double system of conflicting laws in the same State is plainly hostile to the reign

> of law. Certainly, the fortuitous circumstance of residence out of a State of one of the parties to a litigation ought not to give rise to a discrimination against others equally concerned but locally resident. The source of substantive rights enforced by a Federal court under diversity jurisdiction, it cannot be said too often, is the law of the States. Whenever that law is authoritatively declared by a State, whether its voice be the legislature or its highest court, such law ought to govern in litigation founded on that law whether the forum of application is a State or a federal court and whether the remedies be sought at law or may be held in equity."

The question was examined and extended by this Court in the case of *Dr. Furman Angel* v. *W. H. Bullington*, 330 U. S. 183, 91 L. Ed. 832. In that case, a North Carolina statute prohibited a suit for recovery of a deficiency on a mortgage indebtedness. Suit was filed by the respondent in the state court and met an adverse judgment, whereupon the respondent plaintiff filed suit in the United States District Court on the theory that the contract was not void but merely unenforceable in a North Carolina court, and since diversity of citizenship existed, relied upon the *Lupton* case, contending that suit might be maintained in the Federal District Court. The Court held, in the first place, that the respondent plaintiff, not having appealed from the judgment rendered in the state court, was bound by the judgment; that the same was *res judicata*. The Court further held, however, that no suit could be maintained in the Federal court based upon diversity of citizenship unless the suit could be maintained in the state court, and in doing so held that the *Lupton* case was obsolete. The Court used the following language:

> "It is suggested that the North Carolina Supreme Court construed the North Carolina statute to close only the North Carolina State courts but not the federal

court sitting in North Carolina. In the first place, the North Carolina Supreme Court said no such thing. It construed the statute expressive of State policy and spoke only of the jurisdiction of the State courts because it was concerned only with the State courts. Secondly, it is most incongruous to attribute to the legislature and judiciary of North Carolina the imposition of a restriction against all its citizens from suing for a deficiency judgment, while impliedly authorizing citizens of other States to secure such deficiency judgments against North Carolinians. Thirdly, a North Carolina statute, upheld by the highest court of North Carolina, is of course expressive of North Carolina policy. The essence of diversity jurisdiction is that a federal court enforces State law and State policy. If North Carolina has authoritatively announced that deficiency judgments cannot be secured within its borders, it contradicts the presuppositions of diversity jurisdiction for a federal court in that State to give such a deficiency judgment. North Carolina would hardly allow defeat of a State-wide policy through occasional suits in a federal court. What is more important, diversity jurisdiction must follow State law and policy. A federal court in North Carolina, when invoked on grounds of diversity of citizenship, cannot give that which North Carolina has withheld. Availability of diversity jurisdiction which was put into the Constitution so as to prevent discrimination against outsiders is not to effect discrimination against the great body of local citizens.

"Cases like David Lupton's Sons Co. v. Automobile Club, 225 U. S. 489, 56 L. ed. 1177, 32 S. Ct. 711, Ann. Cas. 1914A 699, are obsolete insofar as they are based on a view of diversity jurisdiction which came to an end with Erie R. Co. v. Tompkins, 304 U. S. 64, 82 L. ed. 1188, 58 S. Ct. 817, 114 A. L. R. 1487. That decision drastically limited the power of federal district courts to entertain suits in diversity cases that could not be brought in the respective State courts or were barred by defenses controlling in the State courts. Com-

pare Suydam v. Broadnax, 14 Pet. (U.S.) 67, 75, 10 L. ed. 357, 361. Of course, where resort is had to a federal court not on grounds of diversity of citizenship but because a federal right is claimed, the limitations upon the courts of a State do not control a federal court sitting in the State. Holmberg v. Armbrecht, 327 U. S. 392, 90 L. ed. 743, 66 S. Ct. 582, 162 A. L. R. 719."

The Court of Appeals committed error in stating that the announcement of this court in the Bullington Case to the effect that the Lupton case and other similar cases were obsolete was merely argumentative. The decision of the court in the Bullington Case was placed upon two grounds, either of which was a sufficient basis for the court's decision. The court held that the judgment in favor of the petitioner in the Bullington case was *res judicata* and that the decision was binding upon the respondent as to all questions actually decided or which might have been included; that since the respondent had not appealed from the decision in the North Carolina State Court the same had become final and the Respondent was barred by the adjudication. However, the court also proceeded to say that, irrespective of that question, since jurisdiction was based upon diversity of citizenship, and the action was one which could not be maintained in the State court, no action could be maintained on the same cause of action in the Federal court. It is very true that the Court might have based its decision entirely upon either ground, but that was a question for it to decide, and having based its decision upon both grounds, either of which would afford a sufficient basis for the Court's decision, neither of the Court's announcements may be disregarded. Under that decision the Lupton case became obsolete and may not be used as authority for the maintenance of the present suit.

In the case of *Bullington* v. *Angel*, D. C., North Carolina,

56 Fed. Supp. 372, where the suit was brought after final disposition in the Supreme Court of North Carolina, 220 N. C. 18, S. E. 2d 411, the only question determined by the District Judge was that the limitation on the jurisdiction of State courts provided in the North Carolina statute did not deprive the Federal court of jurisdiction. The syllabus is in the following language:

> "The North Carolina statute barring the recovery of deficiency judgments, which is construed as a limitation on the jurisdiction of the courts of that state, does not deprive the Federal District Court of jurisdiction of an action brought by a nonresident to recover a deficiency judgment in an amount in excess of $3,000 based on a mortgage executed in Virginia on land located in Virginia. Public Laws N. C. 1933, c. 36; Jud. Code #24 (1) 28 U. S. C. A. #41 (1)."

The Court passed on no certain question.

When we turn to the case of *Angel* v. *Bullington* on appeal to the 4th Cir., 150 Fed. 2d, 679, the court affirmed the judgment of the District Judge and relied upon the *Lupton* case. The case of *Guaranty Trust Company of New York* v. *York* was directed to the attention of the Court in response to which the following language was used by Judge Dobie in affirming the action of the District Judge:

> "The very recent case of Guaranty Trust Co. of New York v. York, 325 U. S. —, 65 S. Ct. 1464, decided by the Supreme Court June 18, 1945, after the argument in the pending case, has come to our attention. It holds specifically that an action which would be barred by a State statute of limitations, of brought in a State court, would also be barred if brought in a Federal court in equity in the same State under the provisions of the Federal statutes relating to diversity of citizenship. The burden of the decision which follows the principle of Erie Ry. Co. v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487, is that

'since a federal court adjudicating a state-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the State, it cannot afford recovery if the right to recover is made unavailable by the State nor can it substantially affect the enforcement of the right as given by the State.' (325 U. S.—, 65 S. Ct. 1469). It will be noticed that the cause of action there under consideration arose under the law of the State in which the action was brought whereas in the pending case the cause of action was based upon a contract executed under the law of another State. We think, moreover, that the decision does not affect the rule that a State statute cannot restrict the jurisdiction of the Federal courts based on diversity of citizenship, and that the decision does not relate to the questions, discussed in the cases last cited, as to how far the public policy of a State may modify its obligations under the full faith and credit clause of the Federal Constitution or the due process clause of the Fourteenth Amendment."

When the case reached this court on Certiorari, petitioner's Counsel expressly presented to the Court the view that if the Respondent could not maintain his suit in the State court the same could not be prosecuted in the Federal court. We take the following language from brief of Counsel for petitioner. 91 L. Ed. 833:

"If the statute was valid for the purposes enacted, it was binding on both the state and Federal courts. Erie R. Co. v. Tompkins, 304 U. S. 64, 82 L. ed 1188, 58 S. Ct. 817, 114 A. L. R. 1487; Guaranty Trust Co. v. York, 326 U. S. 99, 89 L. ed. 2079, 65 S. Ct. 1464, 160 A. L. R. 1231.

"Since it has been judicially determined by a court of competent jurisdiction that the state court does not have jurisdiction to try the causes, the Federal court, under the authority of Erie R. Co. *v.* Tompkins, 304, U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817, 114 A. L. R. 1487; Guaranty Trust Co. *v.* York, 326 U. S. 99, 89 L. Ed.

2079, 65 S. Ct. 1464, 160 A. L. R. 1231 is likewise without authority to maintain the action."

The brief of Counsel for petitioner likewise presented the view that the Respondent was barred from recovery by the Judgment of the Supreme Court of North Carolina. When we turn to brief of the Attorneys for the Respondent we find that both questions were presented. The Circuit Court of Appeals therefore committed error in passing on petition for rehearing in holding that this Court did not intend to hold that the *Lupton* case was obsolete and that the language in response thereto was purely argumentative. An analysis of the case with the two preceeding appeals demonstrates that the Court intended as it had the right to do, to decide both questions and the Court statement that the *Lupton* case was obsolete is just as much a part of the Court's opinion as that dealing with the question of *res judicata*.

At the time the statute was passed the rule supported by uniform authority was that the Federal court was a State court in the district in which it sat. The following cases are directly in point: *Guaranty Trust Co.* v. *York*, 326 U. S. 99, 89 L. Ed. —; *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, 114 A. L. R. 1487; *Palmer* v. *Hoffman*, 318 U. S. 100, 87 L. Ed. 645, 145 A. L. R. 710 (burden of proof); *Stone* v. *New York Life Insurance Co.*, 311 U. S. 464, 85 L. Ed. 284 (sufficiency of proof); *Cities Service Oil Co.* v. *Dunlap*, 308 U. S. 208, 84 L. Ed. 196 (as to conflict of laws); *Klaxton Co* v. *Stentor Electric Manufacturing Co.*, 313 U. S. 487, 85 L. Ed. 1477. The rule derived from these cases is that a litigant filing suit in the Federal Court stands in exactly the same position as if the suit had been filed in the State court. Such litigant can derive no advantage in the Federal court over that available to the litigant in the State court insofar as the

applicable law determining the controversy is concerned. The contracts constituting the cause of action of Respondent violated the statutes and public policy of the State of Mississippi which statutes and public policy become embodied in and became part of the laws of the State of Mississippi. A litigant filing suit in the Federal court may escape local prejudice but cannot take refuge therein from the laws, statutes, and public policy of the State.

The right of the Respondent to maintain its suit in the Federal court does not involve a question of jurisdiction. No statute of Mississippi could prevent a Respondent from going into the Federal court to enforce a right or from removing the case from a State Court to the Federal Court. *Barrow* v. *Kane*, 170 U. S. 100; 42 L. Ed. 964; *Tom J. Terral* v. *Burk Construction Co.* 257 U. S. 529, 66 L. Ed. 352, 21 A. L. R. 186; *Southern R. R. Co.* v. *Allison*, 190 U. S., 326. The Mississippi statutes did not prevent the Respondent from filing a suit in the Federal Court. The Respondent availed itself of its constitutional right to do so and was heard however, when it filed its suit in Federal court it was face to face with the State law, the same Juris Prudence prevailed in the Federal court as would have confronted the Respondent in the State court. It could not convert an unenforceable right of action into a valid cause of action by going across the street and filing its suit in the Federal court. There was no cause of lack of jurisdiction but failure to have because of action.

In the case of *Wabash R. Co.* v. *Duncan* (8th Cir.) 170 Fed. (2d) 38, where the following language is used at *Page 41:*

> " 'Jurisdiction is the right to put the wheels of justice in motion and to proceed to the final determination of a cause upon the pleadings and evidence. . . . It may undoubtedly be shown in defense that plaintiff has no right under the allegations of his bill or the

facts of the case to bring suit, but that is no defect of jurisdiction, but of title.' Illinois Central Railroad Co. *v.* Adams, 180 U. S. 28, 34, 21 S. Ct. 251, 253, 45 L. Ed. 410. See also Walling *v.* Miller, 8 Cir., 138 F. 2d 629, 631, and cases cited."

Nor neither may it be said that the Mississippi statute merely precluded action in the State court. It is very true that Section 5319, Mississippi 1942 Code provides that the foreign corporation failing to comply should not be permitted to bring or maintain an action or suit in any of the courts of the State. At the time this statute was passed, and for many years prior thereto, the authorities uniformly held that the Federal court was a State court in the District in which it sat.

Ex Parte Schoenberger, 96 U. S. 369, 24 L. Ed. 853; *Great Southern Life Insurance Co.* v. *Burwell* (5th Cir.) 12 Fed. (2d) 244.

In the case of *Sullivan* v. *Title Guarantee and Trust Company* (2d Cir.) 167 Fed. 2d, 393 the court used the following language:

"As we have been often advised, a federal court, in a diversity suit 'should adjudicate controversies as if it were only another state court.' Vanston Bondholders Protective Committee *v.* Green, 329 U. S. 156, 162, 67 S. Ct. 237; Holmberg *v.* Armbrecht, 327 U. S. 392, 394, 66 S. Ct. 582, 90 L. Ed. 743, 162, A. L. R., 719; Guaranty Trust Co. *vs.* York, 326 U. S. 99, 108, 109, 65 S. Ct. 1464, 89 L. Ed. 2079, 160 A. L. R. 1231."

Section 5344, Mississippi Code of 1942 provides that where a foreign corporation violates the law or public policy of the State that it may not sue in any court. The public policy of the State may be found in its statutes and judicial decisions.

Whelchel v. *Stennett*, 192 Miss. 241, 9 So. (2d) 418;

Green v. *White*, 194 Miss. 145, 11 So. (2d) 816; *State* v. *Hines Lumber Company*, 106 Miss. 780, 64 So. 729.

Neither may it be said that the Mississippi statutes are merely procedural. This cause is foreclosed in the case of *Guaranty Bank & Trust Co.* v. *York*. In Stumberg, Conflict of Laws, 128, the following rule is answered:

> "It may be stated thus: procedural rules are those which concern methods of presenting to a court the operative facts upon which the legal relations depend: substantive rules, those which concern the legal effect of those facts after they have been established."

Procedural involves the methods of continuing litigation and judicial procedures. *Brenizer* v. *Nashville R. R. Co.*, 156 Tenn. 479, 3 S. W. (2d) 1053, 8 S. W. (2d) 1099. Procedural is merely the machinery for carrying on a suit. *Taylor* v. *Reg.* 1 Can 65 Substantial law relates to rights and duties which give rights to a cause of action. Procedural is the machinery for carrying on the suit. *Jones* v. *Erie R. R. Co.*, 106 Ohio State, 408, 140 N. E. 366. In the case of *State* v. *Pavelich Washington*, 279 Pacific, 1102, the destinction is drawn in the following language: 50 Corpus Juris, 426:

> "Although the distinction between procedure and substantive law is not always well understood, and is sometimes vague and indistinct, substantive law is well defined in Mix *v.* Nez Perce County, 18 Ida. 695, 112 P. 215, 32 L. R. A. N. S. 534, as that part of the law which creates, defines and regulates rights as opposed to adjective or remedial law, which prescribes the method of enforcing rights, or of obtaining redress for their invasion. It is difficult, therefore, to draw the line in any particular case, beyond which legislative power, over remedy and procedure, cannot pass without touching upon the substantial rights of the parties affected, as it is impossible to fix that boundary by any general condition."

In the case of *Lachman* v. *Penn. Greyhound Lines, Inc.*, (2d Cir.), 160 Fed. (2d) 496, the court said:

> "The line between substance and procedure is not so clearly marked as to be free from doubt in all cases, and the decisions have been influenced by the desire to effectuate the spirit of the doctrine of Erie R. Co. v. Tompkins so as to secure uniformity in the results to be obtained in the state courts and in the Federal courts in diversity cases in each state. This is especially desirable when the remedial law of the state is so closely associated and incorporated with its substantive law as to be necessary in order to maintain and validate the latter. Precourt v. Driscoll, 85 N. H. 280, 157 A. 525, 78 A. L. R. 874."

We respectfully submit that this is an appropriate case for the granting of a Writ of Certiorari. The question involved is one of great public importance. Practically every state in the Union has a statute similar to the Mississippi statute. The conflict between the Court of Appeals in the 5th Circuit and this Court in the *Bullington* case and other cases cited will bring about confusion. We submit that the Writ should be granted as prayed for, that the Judgment of the Court of Appeals of the 5th Circuit be reversed and that of the District Judge be affirmed.

Respectfully submitted,

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APPENDIX "A"

Section 5319, Mississippi Code of 1942

Resident Agent: How Designated.—Every domestic corporation shall maintain an office in the county of its domicile in this state, either in charge of an officer or officers of the corporation, or in charge of some persons or corporation duly designated as resident agent for the service of process by the directors (by whatever name called) of such corporation, a duly certified copy of the resolution designating such resident agent, and the written acceptance of such agency by the agent, to be filed with the secretary of state. In the event of the death, resignation or removal of such resident agent, another shall be substituted within thirty days in the same manner and accompanied by the same fee as in the former appointment; and until such subsfitution, or in event of the failure of a corporation to so designate and qualify a resident agent where one is required by this act; the secretary of state shall be the agent for the service of process upon such corporation without resident agent, until one shall have been designated as herein provided.

Every foreign corporation doing business in the state of Mississippi, whether it has been domesticated or simply authorized to do business within the state of Mississippi shall file a written power of attorney designating the secretary of state or in lieu thereof an agent as above provided in this section, upon whom service of process may be had in the event of any suit against said corporation; and any foreign corporation doing business in the state of Mississippi shall file such written power of attorney before it shall be domesticated or authorized to do business in this state, and the secretary of state shall be allowed such fees therefor as is (sic) herein provided for designating resident agents. Any foreign corporation failing to comply with the above provisions shall not be permitted to bring or maintain any action or suit in any of the courts of this state.

APPENDIX "B"

Section 5339, Mississippi Code of 1942

Foreign Corporations May Be Domesticated.—Every company or corporation incorporated under the laws of any other state, territory or country, now doing business in this state, or hereafter desiring to do business in this state, and desiring to become a domestic corporation in this state, may file with the governor of the state a copy of its charter, or articles of incorporation or association, or in case such company or corporation is incorporated merely by a certificate, then a copy of its certificate of incorporation, duly authenticated and certified under the great seal of the state in which it was incorporated by charter or certificate.

APPENDIX "C"

Section 5343, Mississippi Code of 1942

Charters To Be Filed.—Every company or corporation for profit incorporated under or by virtue of the laws of any government, or of any other state or territory, now or hereafter doing business in this state, shall file in the office of the secretary a copy of its charter or articles of incorporation, or in case such company or corporation is incorporated merely by certificate, then a copy of such certificate duly certified and authenticated. Said charters, articles of incorporation or certificates to be filed shall be duly certified by the president and secretary, or other chief executive of such corporation, and by attaching thereto the corporate seal, and the secretary of state, on the payment of the fees herein provided for shall give certificate that said corporation has filed its charter or articles of incorporation as required by this act, and any foreign corporation which shall not file a copy of its charter or certificate or articles of incorporation, as provided in this act, shall be liable to a fine of not less than $100.00. This section shall not apply to insurance com-

panies, and is not to be taken or construed to change or modify the laws which are directly applicable to the character of corporations.

APPENDIX "D"

Section 5344, Mississippi Code of 1942

Foreign Corporations, Powers.—Corporations which exist by the laws of any other state of the Union, by the acts of Congress, or the laws of any foreign country, may sue in this state by their corporate names, and they shall also be liable to be sued or proceeded against, by attachment or otherwise, as individual non-resident debtors may be sued or proceeded against. And the acts of the agents of any such foreign corporation shall have the same force and validity as the acts of agents of private persons; but such foreign corporations shall not do or commit any act in this state contrary to the laws or policy thereof, and shall not be allowed to recover on any contract made in violation of law or public policy.

APPENDIX "E"

Section 155, Chapter 137, Mississippi Laws of 1944

Real Estate Agents, Rent Collecting Agents, Real Estate Loan Brokers.—Upon each person, whether acting as an individual, as a partnership, or as a member of a partnership, as a corporation, or as an officer or agent of a corporation who is engaged in the business of selling or offering for sale, buying or offering to buy, negotiating the sale or purchase or exchange of real estate; or who is engaged in the business of leasing or offering to lease, renting or offering to rent apartments, or tenant houses, real estate or any interest therein; or who is engaged in the business of collecting any rents as agent for another for compensation; or who is engaged in the business of soliciting or nego-

tiating loans on real estate as agent for another, for a commission, brokerage, or other compensation, as follows:

In municipalities of classes 1 and 2	$20.00
In municipalities of classes 3 and 4	10.00
In municipalities of classes 5, 6, 7 and elsewhere in the county	7.50

Each salesman employed by or working for any licensed real estate agent or agency other than the chief executive officer thereof, shall pay one-half of the said tax.

APPENDIX "F"

Section 224, Chapter 137, Mississippi Laws of 1944

Penalties.—Any person violating any of the provisions of this chapter shall be guilty of a misdemeanor and on conviction thereof shall be fined not more than $500.00 or imprisoned in the county jail not exceeding six months, or by both such fine and imprisonment in the discretion of the court within the limitation aforesaid; and such fine and imprisonment shall be in addition to any other penalty imposed by any particular section of this act. The courts of the county in which the offender resides, or if a company, in which it carries on business, shall have jurisdiction to enforce this section. And persons failing to pay the privilege taxes imposed by this act, and to obtain a license as hereby required, but pursuing the business for which a privilege tax is imposed without procuring such license, may be proceeded against by suit, in addition to being dealt with criminally; and the officer required to collect the tax may seize and sell any property of such person liable for such tax and penalty, in the same manner as he may distrain and sell property of other taxpayers delinquent for the payment of *ad valorem* taxes due on personal property.

APPENDIX "G"

Opinion of the Court

No. 12,259

INTERSTATE REALTY COMPANY

vs.

WOOD

Before Sibley and Lee, Circuit Judges, and Christenberry, District Judge

LEE, Circuit Judge:

This suit was filed by the appellant, a Tennessee corporation, to recover from appellee, a resident of Mississippi, a broker's commission alleged to be due on the sale of certain of appellee's real estate in the State of Mississippi. Appellee in his answer denied the right of appellant to recover, setting up that appellant was a foreign corporation which, because it had never qualified to do business in the State of Mississippi as provided by Mississippi law, was not entitled to maintain any suit in any court in Mississippi. After filing his answer, the appellee called upon appellant to admit, pursuant to Federal Rules of Civil Procedure, Rule 36, 28 U. S. C. A. following section 723c, that it had not qualified to do business in Mississippi. In response, appellant denied that it was doing business in Mississippi, but admitted a number of transactions in that State over a specified period of years. Upon this admission, the court below, on motion for summary judgment, found that appellant was doing business in Mississippi and held that the contract in question was void. Judgment was thereupon entered dismissing the plaintiff's suit with prejudice. This appeal followed.

The two questions involved are (1) Was appellant doing business in Mississippi within the purview of the statutes? and (2) if so, was the contract with appellee which was

entered into in Mississippi null and void because appellant at that time had not qualified to do business in Mississippi?

(1) The record shows that appellant is a corporation organized under the laws of the State of Tennessee, with its domicile in Memphis, Tenn., and that it had never qualified to do business in Mississippi. Through its agents, however, it had contracted to sell real estate in Mississippi and in connection with sales had sent its agents into Mississippi to meet prospective buyers and to show the properties to be sold. Appellant admitted that in 1942 it earned from 3 sales in Mississippi $2,121.45; in 1943, from 2 sales, $4,064.25; in 1944, from 3 sales $12,000; in 1945, from 14 sales, $14,272.27; and in 1946 from 16 sales, $14,430.75. We think that in view of these admissions the court below was correct in holding that appellant was doing business in Mississippi within the meaning of the Mississippi statutes. Marx & Bensdorf, Inc. *v.* First Joint Stock Land Bank of New Orleans, 178 Miss. 345, 173 So. 297; Wiley Electric Co. *v.* Electric Storage Battery Co., 167 Miss. 842, 147 So. 773.

The question remaining is whether or not appellant's failure to qualify to do business in Mississippi struck with nullity the contract sued upon in this case. The pertinent sections of the Mississippi law are set forth in the margin.

The court below rested its decision upon Quartette Music Co. *v.* Haygood, 108 Miss. 755, 67 So. 211, 212, and held that under that case the contract here sued upon was null and void because at the time of contracting the appellant had not qualified to do business in the State of Mississippi. In so holding we think the court erred.

In the Haygood case the plaintiff was a Texas corporation and brought suit in the Circuit Court of Lee County, Mississippi, against J. L. Haygood and G. W. Long on a promissory note signed by them in the sum of $225. The defendant moved to dismiss, setting forth that the plaintiff was a foreign corporation and had not qualified to do business in Mississippi and that the note sued upon was the consideration for business done by the corporation in Mississippi. Plaintiff demurred to the plea on the ground that the law referred to was unconstitutional and that the plea did not state sufficient grounds for a dismissal. The trial

court overruled the demurrer and dismissed the plaintiff's suit, and the plaintiff appealed. The Supreme Court affirmed and, citing an earlier Mississippi case said:

"'Every contract made for, or about, any matter or thing which is prohibited and made unlawful by any statute, is a void contract, though the statute itself does not mention that it shall be so, but only inflicts a penalty on the defaulter, because a penalty implies a prohibition, though there are no prohibitory words in the statute.'

"There are some decisions in our books which apparently conflict with this rule, but they were all overruled by Woodson *v.* Hopkins, 85 Miss. 171, 37 So. 1000, 38 So. 298, 70 L. R. A. 645, 107 Am. St. Rep. 275."

The latest case called to our attention from the Mississippi Supreme Court on the subject is Newell Contracting Co. *v.* State Highway Commission, 195 Miss. 395, 15 So. 2d 700, 702. There the court said:

"We are of the opinion that the court below was correct in holding that the appellant was doing business in this state and that there had been no substantial compliance with the statutes here involved until September 16, 1933, and that hence the contract sued on is void and unenforcible. Quartette Music Co. *v.* Haygood, 108 Miss. 755, 67 So. 211; Peterman Construction & Supply Co. *vs.* Blumenfeld, 156 Miss. 55, 125 So. 548; Wiley Electric Co. *v.* Electric Storage Battery Co., 167 Miss. 842, 147 So. 773; Marx & Bensdorf, Inc. *v.* First Joint Stock Land Bank of New Orleans, 178 Miss. 345, 173 So. 297; Case *v.* Mills Novelty Co., 187 Miss. 673, 193 So. 625, 126 A. L. R. 1102" (Emphasis ours.)

Whether the court is using the word "void" meant absolutely null, or void in the sense of unenforceable, the opinion does not make clear. Citation of the Haygood case would indicate that the court was of the opinion that the contract was absolutely null; but citation of the other cases, all of them opinions by the Supreme Court of Mississippi later in date than the Haygood case, would indicate that the court meant that the contract was "void" only in the sense that it was unenforceable in the Mississippi courts.

In Peterman Construction & Supply Co. *v.* Blemenfeld, supra, the Supreme Court of Mississippi said (156 Miss. 55, 125 So. 550):

". . . we think the case is controlled by Quartette Music Co. *v.* Haygood, supra, in which it is said that a contract made without first complying with the provisions of the above quoted statute could not be enforced in the courts of this state.

"That is the policy of this state, and while this case appears to be hard, in that finally the foreign corporation did comply with the law, yet in so far as it affects this contract the compliance cannot be made to relate back to the date of its execution. It was either enforceable on the date of its execution, or unenforceable. Under the statute, as construed by this court, the contract was not enforceable on its execution, and when the one contract was signed it was, in effect, a volume of business already transacted amounting to 200 separate and distinct contracts, in so far as the relation created between the foreign corporation and the several subscribers is concerned. . . ."

In Wiley Electric Co. *v.* Electric Storage Battery Co., supra, the Supreme Court of Mississippi said (167 Miss. 842, 147 So. 777):

". . . This statute closes the doors of the courts of this state to foreign corporations doing business in this state in violation of its provisions, consequently upon the proof in this record we think the suit should have been dismissed."

In Marx & Bensdorf, Inc. *v.* First Joint Stock Land Bank, supra, the Supreme Court of Mississippi in referring to the statute used the following language (178 Miss. 345, 173 So. 298):

". . . It will be noted that the last clause of that paragraph provides that any foreign corporation failing to comply therewith is barred from bringing and maintaining any suit in the courts of this state."

In Case *v.* Mills Novelty Co., supra, the Supreme Court of Mississippi said (187 Miss. 673, 193 So. 626):

"The servicing of this ice cream dispenser was purely a local transaction, not incidental to or necessary for the formation of the sales contract, and was subject wholly to the supervision and control of the state. It necessarily follows therefore that when servicing this ice cream dispenser, which it did through an agent employed for that purpose, the appellee was doing business in this state, and the contract of which this service agreement is a part violated Section 4164, Code of 1930, and is unenforceable."

(2) We think the cases cited in the Newell Contracting Co. case, with the exception of the Haygood case, all indicate that under the Mississippi statutes the prohibition merely closes the door of the State courts to a foreign corporation which has failed to qualify to do business in that State. That this is the true interpretation of the Mississippi law is made clear in Long Beach Canning Co. *v.* Clark, 1926, 141 Miss. 177, 106 So. 646, and Citizens' Bank of Hattiesburg *v.* Grigsby, 1934, 170 Miss. 655, 155 So. 684. In Long Beach Canning Co. *v.* Clark, supra, the Supreme Court of Mississippi said (141 Miss. 177, 106 So. 648):

". . . In Quartette Music Co. *v.* Haygood, 108 Miss. 755, 67 So. 211, it was held that a foreign corporation doing business in this state, which had not filed its charter as required by this section, could not enforce its obligations in the courts of this state.

". . . .

"The statute does not make a forfeiture of property to the state for the failure to record its charter. It simply refuses the aid of its courts to those doing business in violation of the law without recording their charter."

In Citizens' Bank of Hattiesburg *v.* Grigsby, supra, the Mississippi Supreme Court said (170 Miss. 655, 155 So. 685):

"It is next contended that the contract was void, and that no validity can be given to the deed under the foreclosure.

It will be noted, in considering this contention, that the Franklin Bond & Mortgage Company is not a party to the suit, is seeking no relief in court, and has sought none. The statute bearing on the matter denies, to a corporation violating the statute, access to the courts for any relief. We do not think the statute avoids the contract so as to affect third persons, and we are of the opinion that nobody can raise this question but the state of Mississippi, when suit is brought by third persons, or when the litigation is between other persons than the corporation violating the statute and the state of Mississippi. In other words, a sale under a deed of trust in pais passes the title from the trustee to the purchaser. In the original contract between the Franklin Bond & Mortgage Company and Williams, the title passed from Williams to the trustee. The language of the statute does not make the contract entirely void. See Middleton *v.* Georgetown Merchantile Co., 117 Miss. 134, 77 So. 956; Long Beach Cannong Co. *v.* Clark, 141 Miss. 177, 106 So. 646; Nicholson *v.* Myres, 170 Miss. 441, 154 So. 282; Quitman County *v.* Stritze, 70 Miss. 320, 13 So. 36; and the authorities cited under these cases. See also, Springfield Grocery Co. *v.* Devitt, 126 Miss 169, 88 So. 479.

"In our opinion, the case of Long Beach Canning Co. *v.* Clark, supra, is applicable here. In that case it was held, where a foreign corporation did business in this state without filing its charter as required by Section 945, Code 1906 (which is brought forward in the Code of 1930, section 4164), that this did not prevent it from selling property to liquidate its affairs on discontinuing its business, and that the statute prohibiting a foreign corporation from transacting business unless its charter was filed was intended only to deny such foreign corporation access to the courts of the state to enforce rights growing out of business transacted contrary to the statute. It would be too sweeping a decision to hold that the contract was utterly void as to third persons, and it would impose an unreasonable burden on other parties to compel them to see to it that a corporation had complied with the law of the state, when they desired to buy the property of such corporations."

When, therefore, the court in the Newell case used the words "void and unenforcible," we must interpret "void" as meaning that no relief could be granted to a noncomplying foreign corporation in view of the statute. Supposing a Mississippi resident had sued a nonresident corporation in the Mississippi court for breach of contract, the contract having been entered into in Mississippi, would it be contended that the nonresident corporation could set up that since it had not qualified to do business in the State of Mississippi the contract entered into was void? We think not. The Mississippi statutes deny to the noncomplying corporation permission to bring a suit in the State courts; but they do not prevent such a corporation from being sued upon its contracts in the State courts.

(3, 4) But the prohibition in the State law closing the doors of the State courts extends no further than the State courts. The State of Mississippi is without authority to limit or extend the jurisdiction of the federal courts. If diversity of citizenship exists, the fact that a foreign corporation may not sue in the State courts because it has not complied with the conditions of doing business within the State does not shut the doors of the federal court sitting in that State. See David Lupton's Sons Co. *v.* Automobile Club of America, 225 U. S. 489, 32 S. Ct. 711, 56 L. Ed. 1177, Ann. Cas. 1914A, 699; McLean *v.* York Oil Field Supply Co., Inc., 5 Cir., 138 F. 2d 804; Butler Bros. Shoe Co. *v.* U. S. Rubber Co., 8 Cir., 156 F. 1; Groton Bridge & Mfg. Co. *v.* Amer. Bridge Co., C.C.N.Y., 151 F. 871, 876, 877

We therefore hold that the appellant has the right to sue on its contract in the federal District Court sitting in Mississippi.

The judgment appealed from is reversed.

APPENDIX "H"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 12259

INTERSTATE REALTY COMPANY, *Appellant*,

versus

J. S. WOODS, *Appellee*

Appeal from the District Court of the United States for the Northern District of Mississippi

(October 22, 1948)

On Petition for Rehearing

Before Sibley and Lee, Circuit Judges, and Christenberry, District Judge

Per CURIAM:

A rehearing is granted restricted to the question whether, in a diversity case, the doors of the federal court sitting in Mississippi are shut to a foreign corporation which may not sue in the state court because it has not complied with the condition for doing business within the state, the rehearing to be submitted upon briefs previously filed and to be filed on or before November 15, 1948.

APPENDIX "I"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 12259

INTERSTATE REALTY COMPANY, *Appellant*,

v.

J. S. WOODS, *Appellee*

Appeal from the District Court of the United States for the Northern District of Mississippi

(November 26, 1948)

On Rehearing

Before Sibley and Lee, Circuit Judges, and Christenberry, District Judge.

Per CURIAM:

In our original opinion we held that the contract sued upon was not absolutely void but merely unenforceable in the State Court and that by reason of diversity of citizenship the suit may be maintained in the federal court. On application for rehearing, the appellee cited the case of *Angel v. Bullington*, 330 U. S. 183, as overruling the case of *David Lupton's Sons Co. vs. Automobile Club of America*, 225 U. S. 489, 32 Ct. 711, 56 L. Ed. 1177, upon which reliance was placed by us to sustain jurisdiction in the federal court. Accordingly, we granted a rehearing, restricted in its application to the question whether a foreign corporation might sue in the federal court when the doors of the State courts were closed to it because it had not complied with the conditions for doing business within the State.

The Supreme Court in the *Bullington* case was concerned with the application of the doctrine of res adjudicate under a North Carolina Statute prohibiting a suit for recovery on a deficiency judgment. What was said in that case about cases like *David Lupton's Sons Co. v. Automobile Club* was

argumentatory. We do not consider it to have overruled the *David Lupton's Sons Co.* case upon the question with which we are now concerned and with respect to which the *David Lupton's Sons Co.* case expressly dealt.

Entertaining as we do this view, our original opinion and decree reversing the judgment appealed from are reaffirmed in their entirety and made the judgment of the court on rehearing.

A True copy:
Teste:

_____,
Clerk of the United States Court of Appeals for the Fifth Circuit.

(9782)

OCTOBER TERM 1948

No. 465

REPLY BRIEF OF PETITIONER ON APPLICATION FOR WRIT OF CERTIORARI

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 465

J. S. WOODS,

Petitioner,

vs.

INTERSTATE REALTY COMPANY,

Respondent

REPLY BRIEF OF PETITIONER ON APPLICATION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Summary of Argument

I

Transacting business in the State by the respondent including the making of the contracts sued upon, violated the public policy of the State of Mississippi.

This case is officially reported, *Interstate Realty Company v. Woods*, 168 Fed. 2d, 701 and *Interstate Realty Company v. Woods*, 150 Fed. 2d, 694.

II

It is immaterial whether the contract is absolutely void or merely unenforceable.

III

Cases distinguished.

ARGUMENT

Point I

Transacting business in the State by the respondent, including the making of the contracts sued upon, violated the public policy of the State of Mississippi.

Respondent's counsel, in their brief, present to the Court the view that transacting business in the State of Mississippi by the respondent and entering into the contracts sued upon was not a violation of the public policy of the State of Mississippi. Section 5319, Mississippi Code of 1942, Appendix "A" to Petition for Certiorari, requires a foreign corporation to appoint an agent for service of process and any corporation failing to comply therewith is prohibited from bringing or maintaining an action in any of the courts of the State. Appendix "C", Page 30 of Petition for Certiorari, requires a foreign corporation to file a certified copy of its charter before transacting business and for a failure so to do is subject to a fine of $100.00. Section 5344, Mississippi Code of 1942, Appendix "D" to Petition for Certiorari, Page 31, provides that any foreign corporation committing any act in the State *contrary to the laws or policy thereof* should not be permitted to recover thereupon. In order to ascertain the public policy of the State it is necessary to look at its statutes and judicial decisions. This question was expressly decided against

respondent by the Supreme Court of Mississippi in the case of *State ex rel. Attorney-General v. Edward Hines Lumber Co. et al.*, 106 Miss. 780, 64 So. 729. In that case it appeared that Section 903, Mississippi 1906 Code, limited the amount of property which any domestic corporation might own and provided a penalty therefor. The appellee in that case, a foreign corporation, acquired and owned property in excess of the statutory limit. Suit was brought by the Attorney-General to confiscate the property and was met with the defense that the prohibition applied only to domestic corporations and that a foreign corporation was not therein included. A copy of *Section 903, Mississippi 1906 Code*, is made *Appendix I* hereto. The Supreme Court of Mississippi, construing Section 849 of the Code of 1892 and Section 914 of the Code of 1906, said sections being in identical language with Section 5344, Mississippi Code of 1942, made Appendix "D" to the Petition for Certiorari, held that the appellee, a foreign corporation, was included within the prohibition and violated the public policy of the State of Mississippi. The court used the following language:

> "It seems clear to us that, inasmuch as foreign corporations 'may not do or commit any act in this State contrary to the laws or the policy thereof', it necessarily follows that such corporations may not do in this State what domestic corporations are prohibited from doing. The policy of this State with reference to limitations upon the value of corporate holdings is expressed in our statutes, and while it may be said that Section 849 of the Code of 1892 and Section 914 of the Code of 1906 are declaratory of the common-law rule of comity, yet it seems to us that, the laws and policy of this State being to limit the value of the holdings of domestic corporations, and to penalize domestic corporations for exceeding the statutory limit,

it was the intention of the legislature to apply to foreign corporations the same limitations; otherwise, this policy could be thwarted by the simple expedient of incorporating in other States.

"If the limitation is not an expression of the State's policy, binding upon all corporations and enforceable by a proper proceeding, foreign corporations would be free to gobble up all of the lands of the State, and thus defeat the effort of the legislature to carry out a wise and salutory purpose, clearly indicated by statutes forbidding corporations subject to its control from acquiring lands in excess of a fixed limit of value. There can be no doubt of the legislative intention to limit the size of corporations in this State, and it is difficult to imagine what laws and policies are referred to in Section 849, Code 1892, and Section 914, Code 1906, unless we construe these sections to mean that foreign corporations doing business here may also be forced to conform to the policy of the State, expressed in its statutes."

In the case of *United States* v. *Musgrave*, 160 Fed. 700, the court used the following language:

"The public policy of the government is not limited to such matters as are universally considered as injurious to the public interests, but any acts reasonably calculated to have that effect may be prohibited by statute, and thereupon they are against public policy. United States *v.* Freight Association, 166 U. S. 290, 340, 17 Sup. Ct. 540, 41 L. Ed. 1007; Logan & Bryan *v.* Postal-Tel. Co. (C.C.) 157 Fed. 570, 587.

"In the Freight Association Case the court, speaking by Mr. Justice Peckman, said on that subject:

" 'The public policy of the government is to be found in its statutes, or when they have not yet spoken, then in the decisions of the courts and the constant practice of the government officials; but when the lawmaking power speaks upon a particular subject over which

it has constitutional power to legislate, public policy in such a case is what the statute enacts.' "

In the case of *Angel* v. *Bullington*, 330 U. S. 183, 91 L. Ed. 832, the Court held that a state statute upheld by the highest court of the state is expressive of the public policy of the state. In support of this principle, respondent cites the case of *C. B. & Q. Ry. Co.* v. *Maguire*, 219 U. S. 549, 55 L. Ed. 328, where the following language is used:

> "The legislature, provided it acts within its constitutional authority, is the arbiter of the public policy of the State. While the court, unaided by legislative declaration and applying the principles of the common law, may uphold or condemn contracts in the light of what is conceived to be public policy, its determination as a rule for future action must yield to the legislative will when expressed in accordance with the organic law . . . "

Counsel cite the case of *May* v. *Mulligan*, 36 F. Supp. 596, upon the question of public policy. The following rule is announced at page 598:

> " 'The public policy of a state, established either by express legislative enactment or by the decisions of its courts, is supreme and when once established will not, as a rule, be relaxed even on the ground of comity to enforce contracts, which, though valid where made, contravene public policy.
>
> " 'Courts which declare a contract void as against public policy are not declaring the intention of the parties, as in the ordinary case, but are acting under the obligation of the higher law, which requires the enforcement of that which is for the public good. . . . "

Section 5344, Mississippi 1942 Code, is plain, unambiguous and all embracing. A contract entered into in violation of the laws of the State is unenforceable in any

court. The respondent confessedly violated Sections 5319 and 5343, Mississippi 1942 Code, in making the contracts sued on and, therefore, the contracts were made in violation of law and in violation of the public policy of the State.

Point II

It is immaterial whether the contract is absolutely void or merely unenforceable.

Counsel for respondent present to the Court the view that the contracts sued upon by the respondent were not absolutely void but merely unenforceable. We now reaffirm the position taken in Petition for Certiorari and Brief thereupon that it is immaterial whether the contracts sued upon are absolutely void or merely unenforceable under the state law. The making of the contracts was in violation of the express provisions of the state statute and, therefore, necessarily, in violation of its public policy. It must be borne in mind that the unenforceability of the contracts sued upon by the respondent and the defense thereto set up by the petitioner is not entirely dependent upon the case of *Erie Railroad Company* v. *Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, 114 A. L. R. 1487, but upon the other hand the right of the respondent to recover and the defense of the petitioner is predicated under Section 34 of the Judiciary Act of 1789. Chapter 20, provides that, in making this application, 'laws of the several states' shall be regarded as 'rules of decision . . . in the courts of the United States, in cases where they apply'. In *Swift* v. *Tyson* the Supreme Court held that 'laws' as used in the statute did not embrace decisions of local tribunals but had reference to the positive statutes of the state, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intrater-

ritorial in their nature and character.' The federal courts were thus under obligation to follow state decisions in their interpretation of state statutes and with regard to property rights and other matters of a strictly local character, but were at liberty to decide for themselves what the law of the state was as to other matters.

In the case of *Fidelity Union Trust Co.* v. *Field*, 311 U. S. 169, 85 L. Ed. 109, where the court had under construction a statute of the State of New Jersey, the court used the following language:

> "The question has practical aspects of great importance in the proper administration of justice in the federal courts. It is inadmissible that there should be one rule of state law for litigants in the state courts and another rule for litigants who bring the same question before the federal courts owing to the circumstance of diversity of citizenship."

In the case of *Ruhlin* v. *New York Life Insurance Company*, 304 U. S. 204, 82 L. Ed. 1290, the court used the following language:

> "Application of the 'State law' to the present case, or any other controversy controlled by Erie R. Co. v. Tompkins, does not present the disputants with duties difficult or strange. The parties and the federal courts must now search for and apply the entire body of substantive law governing an identical action in the state courts. Hitherto, even in what were termed matters of 'general' law, counsel had to investigate the enactments of the state legislature. Now they must merely broaden their inquiry to include the decisions of the state courts, just as they would in a case tried in the state court, and just as they have always done in actions brought in the federal courts involving what were known as matters of 'local' law."

The unenforceability of the contracts sued on by the respondent, as well as the petitioner's defense, rests upon

the Mississippi statutes, and the rule applied in *Guaranty Trust Company of New York* v. *York*, 326 U. S. 99, 89 L. Ed. 2079, 160 A. L. R. 1231, applies. Narrowing the issues to the least common denominator, the precise question presented is as to whether or not the respondent might have recovered upon the contracts in question in the state court. It being conceded that no such recovery could be had, it is immaterial whether the contracts are absolutely void or merely unenforceable. The respondent could not walk across the street to the Federal Court and find a different system of jurisprudence. They could not escape the Mississippi statutes and public policy by going into the Federal Court. There is but one exception to this rule and that exception is that a state statute would not be enforced in a Federal Court which was merely procedural. In our brief in support of Petition for Certiorari we have elaborately pointed out that the Mississippi statutes involved are not merely procedural but are embodied in the substantive law of the State of Mississippi. Respondent's counsel have not contended in any brief that the statutes were merely procedural. We also pointed out in our original brief with considerable elaboration that a Federal Court sitting in a state is a State Court, an announcement not questioned by respondent's counsel. We have further pointed out that the Mississippi statutes involved do not deny the jurisdiction of Federal Courts to hear and determine the controversy. Upon the other hand, the respondent filed a suit in the United States District Court on the grounds of diversity of citizenship. The court took jurisdiction of the controversy but held that under the Mississippi statutes, decisions and public policy, the contracts sued upon were unenforceable.

Point III

Cases Distinguished

Counsel cite the case of *Long Beach Canning Company* v. *Clark*, 141 Miss. 177, 106 So. 646. In that case the court held that the mere fact that a foreign corporation had not qualified under the laws of the State of Mississippi did not prevent it from disposing of a single piece of property which it had acquired previously. The court held that the mere sale of a specific piece of property was not transacting business within the state.

The case of *Citizens Bank of Hattiesburg* v. *Grigsby*, 155 So. 684, 170 Miss. 655, merely held that a contract of a foreign corporation failing to comply with the state statutes did not void a conveyance of the property to a third person. The syllabi contains the following language at page 656:

> "Contract for purchase of property sold on foreclosure under deed of trust which had been executed to foreign corporation not having filed its charter within state held not void as to third persons purchasing property (Code 1930, section 4164)."

Counsel site the case of *Brace* v. *Gauges Construction Company*, Eighth Circuit, 36 Fed. (2d) 661. This case is controlled by *Angel* v. *Bullington*, 330 U. S. 183, 91 L. Ed. 832.

Counsel cite the case of *Newell Contracting Company* v. *State Highway Commission*, 195 Miss. 395, 15 So. (2d) 700. This is the latest case from the Supreme Court of Mississippi upon the subject. In that case, within a month after the foreign corporation entered into the contract in question, it fully complied with the statutes of the State of Mississippi and completed the contract involved thereafter. The court held that the contract was void and unenforce-

able except as to a supplemental contract entered into subsequent to compliance by the foreign corporation. The statutes involved are not mere revenue statutes but were enacted in the exercise of the police power of the state and expressive of its public policy. It is important that a foreign corporation designate an agent for service of process. The fee of $5.00 charged therefor bears no relation to the importance of the act. The legislature deemed it important that persons suing a foreign corporation should have definite information as to the service of process. Besides, the appointment of such an agent fixed the venue of such foreign corporation. *Nerbo* v. *Bethlehem Shipbuilding Corporation*, 308 U. S. 365, 84 L. Ed. 167. Likewise, the requirements that a foreign corporation file its charter was not purely for revenue purposes since the information therein contained would be a matter of concern to the state as well as persons dealing with the corporation.

We respectfully submit that the writ of certiorari should be granted as prayed for in the petition.

Respectfully submitted.

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I, William H. Watkins, of counsel for the petitioner in the above entitled case, certify that I have this day sent by United States mail, postage prepaid, to John A. Osionach,

Memphis, Tennessee, L. C. Andrews, Oxford, Mississippi, Phil A. Stone, Oxford, Mississippi, Attorneys for the Respondent, a true and correct copy of the foregoing brief this, the 22nd day of January, 1949.

WILLIAM H. WATKINS,
Of Counsel.

APPENDIX I

Section 903, Mississippi 1906 Code

Limitation on Corporate Holdings—Every corporation of the classes to be or heretofore created under the provisions of this chapter or the laws of this state may hold personal property in any amount necessary and proper for its uses and purposes, and every such corporation, except manufacturing corporations, may hold lands necessary for its purposes to an amount in value not exceeding one million dollars; manufacturing corporations may hold land to an amount not exceeding two million dollars in value, but building, machinery and other fixtures on such land shall be excluded in valuing land. And a corporation shall not have a trust, use or benefit in property held in the name of any person or corporation for its use either expressly or secretly, to a greater amount than it may lawfully hold, nor shall any corporation employ its capital, money or other thing in any way other than in pursuit of its legitimate business; and a corporation offending against any of these provisions shall forfeit its charter and shall also forfeit to the state all real estate held above that which it may lawfully hold, but an increase in the market value of real estate after it has been acquired by a corporation over the limit it was or is authorized to hold shall not operate to forfeit either the charter or any part of the real estate of such corporation. Nothing herein contained shall prevent a corporation from taking land or a lien on land to a greater amount than it may lawfully hold in payment of or as a security for a debt, if the same shall not be held for a longer period than ten years.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 465

J. S. WOODS,

Petitioner,

vs.

INTERSTATE REALTY COMPANY,

Respondent

BRIEF AND ARGUMENT FOR PETITIONER

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

I

Opinions Below

The opinion of the District Judge is not officially reported but is printed in the record at page 70, copy of which is made Appendix 1 to this brief.

The opinion of the Court of Appeals filed June 8, 1948, is reported in *Interstate Realty Company* v. *Woods*, 168 Fed. (2d) 701, and is printed in the record at page —, copy of which is made Appendix 2 to this brief.

The opinion of the Court of Appeals dated October 22, 1948, is reported in 170 Fed. (2d) 74, and copy is made Appendix 3 to this brief.

The opinion of the Court of Appeals dated November 26, 1948, is in the record at page — and is reported in 170 Fed. (2d), page 695, a copy of which is made Appendix 4 to this brief.

II

Jurisdictional Statement

The jurisdiction of this Honorable Court is invoked under New Title 28, United States Code, Judiciary and Judicial Procedure, Sections 1254, 1331, 1332 and 2101, together with Rule 38, 5(b) of this Court.

Time for applying for certiorari to Supreme Court of the United States begins from the date of the overruling of motion for rehearing. *Gypsy Oil Co.* v. *Escoe*, 275 U. S. 498, 72 L. Ed. 393; *U. S.* v. *Seminole Nation*, 299 U. S. 417, 81 L. Ed. 316; *Department of Banking, State of Nebraska* v. *Pink*, 317 U. S. 264, 87 L. Ed. 254, rehearing denied, 318 U. S. 802, 87 L. Ed. 1166; *U. S.* v. *Ellicott*, 223 U. S. 524, 56 L. Ed. 535; *Kingman & Co.* v. *Western Mfg. Co.*, 170 U. S. 675, 42 L. Ed. 1192; *Aspen Mining & Smelting Co.* v. *Billups*, 150 U. S. 31, 37 L. Ed. 986; *Morse* v. *U. S.*, 270 U. S. 151, 70 L. Ed. 518.

III

Grounds of Jurisdiction

(1) The Court of Appeals has decided an important question of Federal law in a way in conflict with the decisions of this Court.

(2) The Court of Appeals has decided an important question of local law in a way in conflict with applicable local decisions.

(3) The Court of Appeals has rendered a decision contrary to the laws and public policy of the State of Mississippi.

IV

Statement of the Case

The question presented in this case is as to whether or not the Court of Appeals committed error in reversing the judgment of the District Court of the United States for the Northern District of Mississippi, in which Court the respondent's complaint was dismissed and denying petition for rehearing.

The respondent, Interstate Realty Company, a Tennessee corporation, filed suit in the United States District Court for the Northern District of Mississippi against the petitioner, an adult resident of such district (Tr. 1). The suit was brought to recover from the petitioner commissions which the respondent claimed were owing to it for bringing about sales of real estate belonging to the petitioner in the State of Mississippi. The amount involved, exclusive of interest and costs, exceeded $3,000.00. The petitioner, in answer to the complaint, alleged that the respondent, a foreign corporation, without becoming domesticated and without qualifying to do business in the State of Mississippi, transacted business in the state out of which transactions the cause of action arose and that, therefore, the contracts entered into between the petitioner and the respondent were null, void and unenforceable in the State of Mississippi, that such contracts were contrary to the law and public policy of the State of Mississippi and no suit could be maintained thereupon, and that the petitioner had a defense thereto. The relevant Mississippi statutes regulating the right of a foreign corporation to transact business in the state will be found in Section 5319, Mississippi Code

of 1942, Appendix 5 hereto; Section 5339, Mississippi Code of 1942, Appendix 6 hereto; Section 5343, Mississippi Code of 1942; Appendix 7 hereto; and Section 5344, Mississippi Code of 1942, Appendix 8 hereto.

The petitioner, under the Federal Rules, requested of respondent admission of certain relevant facts based upon uncontroverted statements contained in the pleadings and admissions of record (Tr. 61-63). Thereupon, petitioner moved for a summary judgment (Tr. 67). The District Judge held that in entering into the contract sued upon, the respondent was engaged in business in the State of Mississippi and that the respondent had not qualified to do business in the State as provided by the statutes thereof and that, therefore, the contracts sued upon were utterly void, that no suit could be maintained in the State, and that the same were therefore not enforceable in the District Court of the United States (Tr. 70-72). Accordingly, the motion for summary judgment on the part of the petitioner was granted and judgment entered dismissing respondent's complaint (Tr. 72). An appeal was taken therefrom to the Court of Appeals, Fifth Circuit. That court held that under the laws and statutes of the State of Mississippi, the contracts sued upon were not absolutely void but only unenforceable in the state court. Accordingly, the court reversed the decision of the District Judge and held that the same might be maintained in the District Court for the Northern District of Mississippi. The case is reported in *Interstate Realty Company* v. *Woods*, 168 Fed. (2d) 70. The court uses the following language:

> "But the prohibition in the State law closing the doors of the State courts extends no further than the State courts. The State of Mississippi is without authority to limit or extend the jurisdiction of the Federal courts. If diversity of citizenship exists, the fact that a foreign corporation may not sue in the State

courts because it has not complied with the conditions of doing business within the State does not shut the doors of the Federal court sitting in that State. See David Lupton's Sons Co. *v.* Automobile Club of America, 225 U. S. 489, 32 S. Ct. 711, 56 L. Ed. 1177, Ann. Cas. 1914A, 699; McLean *v.* York Oil Field Supply Co., Inc., 5 Cir., 138 F. 2d 804; Butler Bros. Shoe Co. *v.* U. S. Rubber Co., 8 Cir., 156 F. 1; Groton Bridge & Mfg. Co. *v.* Amer. Bridge Co., C. C. N. Y., 151 F. 871, 876, 877.

"We therefore hold that the appellant has the right to sue on its contract in the Federal District Court sitting in Mississippi.

"The judgment appealed from is reversed."

The petitioner filed a petition for rehearing which was granted October 22, 1948, and is reported 170 Fed. (2d) 74. Upon consideration thereof, the Court of Appeals adhered to its former opinion reversing the judgment of the District Court for the Northern District of Mississippi. The opinion was filed November 26, 1948, and is reported 170 Fed. (2d) at page 694. This Court granted certiorari February 7, 1949.

V

Errors Relied On for Reversal

The petitioner assigned and relies upon the following errors for reversal of this case:

(1) The Court of Appeals committed error in reversing the decision of the United States District Court for the Northern District of Mississippi which court had dismissed respondent's complaint.

(2) The Court of Appeals committed error in holding that the contracts sued upon by the respondent were enforceable in the United States District Court for the Northern District of Mississippi.

(3) The Court of Appeals committed error in failing and refusing to hold that the contract sued upon, having been entered into in the State of Mississippi by the respondent, were therefore in violation of the statutes and public policy of the State of Mississippi and unenforceable in the District Court of the United States.

VI

Statutes Involved

(A) This case involves a construction of Section 725, Title 28, U. S. C. A., containing the following language:

> "The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

(B) Section 5319, Mississippi 1942 Code, made Appendix 5 to this brief.

(C) Section 5339, Mississippi Code of 1942, made Appendix 6 to this brief.

(D) Section 5343; Mississippi Code of 1942, made Appendix 7 to this brief.

(E) Section 5344, Mississippi Code of 1942, made Appendix 8 to this brief.)

VII

ARGUMENT

Point I

The Court of Appeals has decided an important question of Federal law contrary to applicable decisions of this Court and to the law and public policy of the State of Mississippi.

This case is before the Court on certiorari to the Court of Appeals of the Fifth Circuit and involves the question

as to whether or not a foreign corporation transacting business in the State of Mississippi without qualifying in violation of its laws and public policy may maintain suit in the Federal Court upon contracts entered into in the State of Mississippi which contracts are illegal, contrary to the laws and public policy thereof and, consequently, void and unenforceable.

Section 5319, Mississippi 1942 Code, Appendix 5 hereto, provides that every foreign corporation before doing business in the State shall appoint an agent upon whom service of process may be had, and that any foreign corporation failing to comply with this provision shall not be permitted to bring or maintain any action or suit in any of the courts of the State.

Section 5339, Mississippi 1942 Code, Appendix 6 hereto, provides how a foreign corporation may become domesticated.

Section 5343, Mississippi 1942 Code, Appendix 7 hereto, prohibits any corporation from transacting business in the State without compliance with the statute by filing a duly certified copy of its articles of incorporation, etc., and the act provides for a fine of $100.00 for violation of the act.

Section 5344, Mississippi 1942 Code, Appendix 8 hereto, contains the following language:

> "And the acts of the agents of any such foreign corporation shall have the same force and validity as the acts of agents of private persons; but such foreign corporations shall not do or commit any act in this State contrary to the laws of policy thereof, and shall not be allowed to recover on any contract made in violation of law or public policy."

In the case of *Quartette Music Co.* v. *Haygood*, 108 Miss. 755, 67 So. 211, in determining the question involved here, the court used the following language:

"A long line of decisions of this court support the judgment of the learned trial judge.

"Section 935, Code of 1906, provides that:

"'Every * * * corporation for profit incorporated under or by virtue of the laws of * * * any other state * * * shall file in the office of the secretary of state a copy of its charter of incorporation.'

"The statute further provides that:

"Any 'foreign corporation which shall not file a copy of its charter or certificate of articles of incorporation * * * shall be liable to a fine of not less than one hundred dollars.'

"In Bohn *v.* Lowery, 77 Miss. 427, 27 So. 605, this rule is approved:

"'Every contract made for, or about, any matter or thing which is prohibited and made unlawful by any statute, is a void contract though the statute itself does not mention that it shall be so, but only inflicts a prohibition, though there are no prohibitory words in the statute.'

"There are some decisions in our books which apparently conflict with this rule, but they were all overruled by Woodson *v.* Hopkins, 84 Miss. 171, 37 So. 1000, 38 So. 298, 70 L. R. A. 645, 107 Am. St. Rep. 275."

The court expressly approved the case of *Bohn* v. *Lowery*, 77 Miss. 427, 27 So. 605, in which case a physician practiced medicine in the state without procuring a license which failure was punishable as a misdemeanor.

The latest case in the Supreme Court of Mississippi dealing with the subject matter is *Newell Contracting Co.* v. *State Highway Commission*, 195 Miss. 395, 15 So. (2d) 700, where the court said:

"We are of the opinion that the court below was correct in holding that the appellant was doing busi-

ness in this State and that there had been no substantial compliance with the statutes here involved until September 16, 1933, and that hence the contract sued on is void and unenforceable. Quartette Music Co. *v.* Haygood, 108 Miss. 755, 67 So. 211; Peterman Construction & Supply Co. *v.* Blumenfeld, 156 Miss. 55, 125 So. 548; Wiley Electric Co. *v.* Electric Storage Battery Co., 167 Miss. 842, 147 So. 773; Marx & Bensdorf, Inc. *v.* First Joint Stock Land Bank of New Orleans, 178 Miss. 345, 173 So. 297; Case *v.* Mills Novelty Co., 187 Miss. 673, 193 So. 625, 126 A. L. R. 1102."

In the case of *David Lupton Sons Co.* v. *Automobile Club of America*, 225 U. S. 489, 56 L. Ed. 1177, Ann. Cas. 1914A, this Court held that a New York statute which prohibited a foreign corporation from filing suit in a State court unless it presented to the court a certificate to the effect that it had qualified to do business in the State of New York could not maintain a suit in the State court. This Court held that the New York statute did not prevent a foreign corporation from enforcing an obligation entered into in violation of the statute in the United States District Court in New York. This Court held that the prohibition extended no further than closing the State court to the foreign corporation. It must be borne in mind, however, that the New York statute did not make the transacting of business by an offending foreign corporation a crime nor did the State of New York have a general statute such as Section 5344, Mississippi Code of 1942, providing that a foreign corporation committing any act contrary to the laws or policy thereof shall not be allowed to recover on any contract made in violation of law or public policy.

Beginning with the case of *Swift* v. *Tyson*, 16 Pet. 1, 18, 10 L. Ed. 865, 871, this Court held that the Federal Court sitting in a State was at liberty to investigate and determine the common law for itself. This rule prevailed for

many years, and until the decision of the court in *Erie Railroad Company* v. *Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, 114 A. L. R. 1487. There, a cause of action in tort which arose in the State of Pennsylvania was the subject of suit in the State of New York, and following the case of *Swift* v. *Tyson*, the District Court of New York held that the common law of the forum would control.

This Court reversed the decision of the Second Circuit, and in so doing held that there was no general common law of the Federal courts, but that the common law of the state would be applied. The court used the following language:

> "Experience in applying the doctrine of Swift *v.* Tyson, had revealed its defects, political and social; and the benefits expected to flow from the rule did not accrue. Persistence of state courts in their own opinions on questions of common law prevented uniformity; and the impossibility of discovering a satisfactory line of demarcation between the province of general law and that of local law developed a new well of uncertainties. . . .
>
> "On the other hand, the mischievous results of the doctrine had become apparent. Diversity of citizenship jurisdiction was conferred in order to prevent apprehended discrimination in state courts against those not citizens of the State. Swift *v.* Tyson introduced grave discrimination by non-citizens against citizens. It made rights enjoyed under the unwritten 'general law' vary according to whether enforcement was sought in the state or in the federal court; and the privilege of selecting the court in which the right should be determined was conferred upon the non-citizen. Thus, the doctrine rendered impossible equal protection of the law. In attempting to promote uniformity of law throughout the United States, the doctrine had prevented uniformity in the administration of the law of the State . . . ."

However, in this case, the right of the respondent to recover and the defense of the petitioner is predicated under Section 34 of the Judiciary Act of 1789, being Section 725, U. S. C. A., Title 28, which provides that the laws of the several states shall be regarded as rules of decision in the courts of the United States while in the case of *Swift* v. *Tyson* this Court held that the word "laws" as used in the statute did not embrace decisions of local tribunals but had reference to the positive statute of the state and the construction thereof adopted by the local tribunals. Under the Judiciary Act of 1789, the Federal courts were thus under obligation to follow state decisions in their interpretation of state statutes in regard to matters of a strictly local character.

This case does not depend upon the case of *Erie Railroad Company* v. *Tompkins*, but is determinable upon the construction of the Judiciary Act of 1789 hereinbefore set out. The question was most recently examined by this Court in the case of *Dr. Furman Angel* v. *W. H. Bullington*, 330 U. S. 183, 91 L. Ed. 832. In that case a North Carolina statute prohibited suit for recovery of a deficiency judgment on a mortgage indebtedness. Suit was filed by the respondent in the state court and on account of the state statute met an adverse judgment whereupon the respondent plaintiff filed suit in the United States District Court in the State of North Carolina on the theory that the contract was not void but merely unenforceable in a North Carolina state court and, since diversity of citizenship existed, relied upon the *Lupton* case that suit might be maintained in the Federal District Court. This Court held, in the first place, that the respondent plaintiff, not having appealed from the judgment rendered in the state court, was bound thereby; that the same was *res adjudicata*. The Court further held that the Federal court sitting in the

State of North Carolina was another court of the state and that no suit could be maintained in the Federal court based upon diversity of citizenship unless the suit could be maintained in the state court. The Court used the following language:

> "It is suggested that the North Carolina Supreme Court construed the North Carolina statute to close only the North Carolina State courts but not the federal court sitting in North Carolina. In the first place, the North Carolina Supreme Court said no such thing. It construed that statute expressive of State policy and spoke only of the jurisdiction of the State courts because it was concerned only with the State courts. Secondly, it is most incongruous to attribute to the legislature and judiciary of North Carolina the imposition of a restriction against all its citizens from suing for a deficiency judgment, while impliedly authorizing citizens of other States to secure such deficiency judgments against North Carolinians. Thirdly, a North Carolina statute, upheld by the highest court of North Carolina, is of course expressive of North Carolina policy. The essence of diversity jurisdiction is that a federal court enforces State law and State policy. If North Carolina has authoritatively announced that deficiency judgments cannot be secured within its borders, it contradicts the presuppositions of diversity jurisdiction for a federal court in that State to give such a deficiency judgment. North Carolina would hardly allow defeat of a Statewide policy through occasional suits in a federal court. What is more important, diversity jurisdiction must follow State law and policy. A federal court in North Carolina, when invoked on grounds of diversity of citizenship, cannot give that which North Carolina has withheld. Availability of diversity jurisdiction which was put into the Constitution so as to prevent discrimination against outsiders is not to effect discrimination against the great body of local citizens.
>
> "Cases like David Lupton's Sons Co. *v.* Automobile Club, 225 U. S. 489, 56 L. Ed. 1177, 32 S. Ct. 711, Ann.

Cas. 1914A 699, are obsolete insofar as they are based on a view of diversity jurisdiction which came to an end with Erie R. Co. *v.* Tompkins, 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817, 114 A. L. R. 1487. That decision drastically limited the power of federal district courts to entertain suits in diversity cases that could not be brought in the respective State courts or were barred by defenses controlling in the State courts."

The Court of Appeals in reconsidering petition for rehearing committed error in stating that the announcement of the court in the *Bullington* case to the effect that the *Lupton* case, and other similar cases were obsolete was merely argumentative. The decision of the court in the *Bullington* case was placed upon two grounds, either of which afforded a sufficient basis for the court's decision. In the first instance, the court held that the judgment in favor of the petitioner rendered in the state court was *res adjudicata* and that the decision was binding upon the respondent as to all questions actually decided or which might have been included. However, the court, irrespective of that question, since jurisdiction was based upon diversity of citizenship, held that since the action was one which could not be maintained in the state court, no action could be maintained on the same cause of action in the federal court. It is very true that the court might have based its decision entirely upon the grounds of *res adjudicata* but that was a question for the court to decide. It is not unusual for this and other courts to base decisions upon more than one ground, either of which would afford a sufficient basis therefor. Neither of the court's announcements may be disregarded. The language used by this Court in respect to the *Lupton* case being obsolete was in direct response to the decision of the Court of Appeals, Fourth Circuit, 150 Fed. (2d) 679, which affirmed the judgment of the District Court. Neither the Court of Appeals

for the Fourth Circuit nor the decision of the District Judge, 56 Fed. Supp. 372, made any reference whatsoever to the question of the finality of the judgment of the North Carolina State court. In both courts, the decisions were based entirely upon the holding that the statute of the State of North Carolina only limited the jurisdiction of the state court and did not prevent the federal court from exercising jurisdiction, citing the *Lupton* case. When the case reached this Court on certiorari, counsel for petitioner, as will appear from the brief, urged upon the Court the theory that the respondent was barred by the judgment rendered in the state court and, in the alternative, presented fully the view that if the North Carolina statute was valid, it was binding upon both the federal and the state courts, citing *Erie Railroad Co.* v. *Tompkins* and *Guaranty Trust Co.* v. *York*. Upon the other hand, respondent's counsel fully presented the view, first, that the doctrine of *res adjudicata* had no application in the case and, in the alternative, that the case of *Erie Railroad Co.* v. *Tompkins* was not pertinent, invoking the Federal Judiciary Act of 1789.

The holding of this Court in respect to the *Lupton* case was in direct response to the opinions of the Court of Appeals, Fourth Circuit, and the District Judge, as well as to the arguments of counsel of the petitioner and the respondent. It is interesting to note that the Court of Appeals for the Fourth Circuit in its opinion distinguished and therefore refused to follow the case of *Guaranty Trust Company of New York* v. *York*, 326 U. S. 99, 89 L. Ed. 2079, 160 A. L. R. 1231, on the ground that there the cause of action arose under the law of the state in which the action was brought whereas in the *Bullington* case the cause of action was based upon a contract executed under the laws of another state. No such distinction could be predicated in the present case.

The case of *Guaranty Trust Co. v. York, supra*, is a direct authority and is a controlling authority in this case, and stems from the Federal Act of 1789. In that case, a suit in equity was filed in the United States District Court for the State of New York by the respondent, York. The position taken in the suit was that, since the cause of action was one in equity, the six-year statute of limitations plead by the petitioner in bar of the action was not applicable; that, upon the other hand, the question of the statute of limitations was a remedial matter of procedure, and that since the respondent had no adequate remedy at law, but had the right to go into a court of equity, it was asserted that the New York statute of limitations would not be applicable. The Supreme Court of the United States reversed the decision of the Second Circuit, and used the following language:

> "Matters of 'substance' and matters of 'procedure' are much talked about in the books as though they defined a great divide cutting across the whole domain of law. But, of course 'substance' and 'procedure' are the same key-words to very different problems. Neither 'substance' nor 'procedure' represents the same invariants. Each implies different variables depending upon the particular problem for which it is used. See Home Ins. Co. *v.* Dick, 281 U. S. 397, 409, 74 L. Ed. 926, 934, 50 S. Ct. 338, 74 A. L. R. 701. And the different problems are only distantly related at best, for the terms are in common use in connection with situations turning on such different considerations as those that are relevant to questions pertaining to ex post facto legislation, the impairment of the obligations of contract, the enforcement of federal rights in the State courts and the multitudinous phases of the conflict of laws. See, e. g., American R. Exp. Co. *v.* Levee, 263 U. S. 19, 21, 68 L. Ed. 140, 143, 44 S. Ct. 11; Davis *v.* Wechsler, 263 U. S. 22, 24, 25, 68 L. Ed. 143, 145, 146, 44 S. Ct. 13; W. B. Worthen Co. *v.* Kavanaugh, 295 U. S. 56, 60, 79 L. Ed. 1298, 55 S. Ct. 555, 97 A. L. R. 965;

Garrett v. Moore McCormack Co., 317 U. S. 239, 248, 249, 87 L. Ed. 239, 24 246, 63 S. Ct. 246; and see Tunks, Categorization and Federalism: 'Substance' and 'Procedure' After Erie Railroad v. Tompkins (1939), 34 Ill. L. Rev. 271, 274-276; Cook, Logical and Legal Bases of Conflict of Laws (1942), 163-165.

"Here we are dealing with a right to recover derived not from the United States but from one of the States. When, because the plaintiff happens to be a non-resident, such a right is enforceable in a federal as well as in a State court, the forms and mode of enforcing the right may at times, naturally enough, vary because the two judicial systems are not identical. But since a federal court adjudicating a State-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the State, it cannot afford recovery if the right to recover is made unavailable by the State nor can it substantially affect the enforcement of the right as given by the State.

"And so, putting to one side abstractions regarding 'substance' and 'procedure', we have held that in diversity cases the federal courts must follow the law of the State as to burden of proof. Cities Serv. Oil Co. v. Dunlap, 308 U. S. 208, 84 L. Ed. 196, 60 S. Ct. 201, as to conflict of laws, Klaxon Co. v. Stentor Electric Mfg. Co., 313 U. S. 487, 85 L. Ed. 1477, 61 S. Ct. 1020, as to contributory negligence, Palmer v. Hoffman, 318 U. S. 109, 117, 87 L. Ed. 645, 651, 63 S. Ct. 477, 144 A. L. R. 719. And see Sampson v. Channell, 110 F. 2d 754. Erie R. Co. v. Tompkins has been applied with an eye alert to essentials in avoiding disregard of State law in diversity cases in the federal courts. A policy so important to our federalism must be kept free from entanglements with analytical or terminological niceties."

The Court also used the following language:

"Diversity jurisdiction is founded on assurance to non-resident litigants of courts free from susceptibility

to potential local bias. The Framers of the Constitution, according to Marshall, entertained 'apprehensions' lest distant suitors be subject to local bias in State courts, or, at least, viewed with 'indulgence the possible fears and apprehensions' of such suitors: Bank of the United States *v.* Deveaux, 5 Cranch (US) 61, 87 3 L. Ed. 38, 44. And so Congress afforded out-of-State litigants another tribunal, not another body of law. The operation of a double system of conflicting laws in the same State is plainly hostile to the reign of law. Certainly, the fortuitous circumstance of residence out of a State of one of the parties to a litigation ought not to give rise to a discrimination against others equally concerned but locally resident. The source of substantive rights enforced by a Federal court under diversity jurisdiction, it cannot be said too often, is the law of the States. Whenever that law is authoritatively declared by a State, whether its voice be the legislature or its highest court, such law ought to govern in litigation founded on that law whether the forum of application is a State or a federal court and whether the remedies be sought at law or may be held in equity."

The duty of Federal courts to follow State court decisions on the construction and application of State statutes antedates the decision in *Erie Railroad Company* v. *Tompkins* and the cases decided on that question since the decision present no novel situation and are merely cumulative of those decided before. The decision in *Erie Railroad Company* v. *Tompkins* left that rule untouched as it prevailed under the doctrine of *Swift* v. *Tyson* and both before and after the decision in the *Tompkins* case, the Federal court were and now are bound by the decisions of the highest court of the State in the construction of a state statute. The case of *Guaranty Trust Company* v. *York* and *Angel* v. *Bullington* are in accord therewith as will appear from the following cases:

In the case of *Fidelity Union Trust Co.* v. *Field*, 311 U. S. 169, 85 L. Ed. 109, where the court had under consideration a statute of the State of New Jersey, the court used the following language:

> "The question has practical aspects of great importance in the proper administration of justice in the Federal courts. It is inadmissible that there should be one rule of State law for litigants in the State courts and another rule for litigants who bring the same question before the Federal courts owing to the circumstance of diversity of citizenship."

In the case of *West* v. *American Telephone & Telegraph Co.*, 311 U. S. 223, 85 L. Ed. 139, 132 A. R. L. 956, the Court used the following language:

> "But the obvious purpose of sec. 34 of the Judiciary Act is to avoid the maintenance within a state of two divergent or conflicting systems of law, one to be applied in the State courts, the other to be availed of in the Federal courts, only in case of diversity of citizenship. That object would be thwarted if the Federal courts were free to choose their own rules of decision whenever the highest court of the State has not spoken."

In the early case of *United States* v. *Reid*, 53 U. S. 361, (12 How.), 13 L. Ed. 1023, it was held that Sec. 725 was necessarily intended to confer on Federal courts jurisdiction necessary to enable them to administer state laws.

In the case of *Nichols* v. *Atcheson T. & S. F. Railway Co.*, 264 U. S. 348, 68 L. Ed. 720, it is held that where a case is removed from the State to the Federal court, it is governed by exactly the same rule which would have controlled it in the State court.

In the case of *Bowditch* v. *City of Boston*, 101 U. S. 16, 25 L. Ed. 980, this Court held that in determining the liability of a municipality a State statute involved questions

of local law and the Court was required to determine the controversy as if it were a court of the State sitting there to apply her jurisprudence.

The courts of the United States held in a State are administering the laws of that State and bound by the rules governing State courts. *Asplind* v. *Nixon*, 4 How. 467, 11 L. Ed. 1059.

See also *Allison* v. *Great Atlantic & P. Tea Co.* (1938; C. C. A. 4th) 99 F. (2d) 507; *Tobin* v. *Hymers* (1938; C. C. A. 9th) 99 F. (2d) 740; *American Nat. Ins. Co.* v. *Belch* (1938; C. C. A. 4th) 100 F. (2d) 48; *Jones* v. *New York Casualty Co.* (1938; D. C.) 23 F. Supp. 932, infra, IV. b. See also *Winder* v. *Consolidated Underwriters* (1938, D. C.) 25 F. Supp. 451, infra, XIII., and *Leslie* v. *Johnson* (1938; D. C.) 24 F. Supp. 406, supra, II.

Respondent's counsel takes the view that transacting business in the State of Mississippi by the respondent and entering into contracts sued upon was not a violation of the public policy of the State of Mississippi. Section 5319, made Appendix 5 hereto, requires a foreign corporation to appoint an agent for service of process and any corporation failing to comply therewith is prohibited from bringing or maintaining an action in any of the courts of the State. Section 5343 of the Mississippi Code, made Appendix 7 hereto, requires a foreign corporation to file a certified copy of its charter before transacting business within the State and for a violation thereof is subject to a fine of $100.00. Section 5344 of the Mississippi Code, Appendix 8 hereto, provides that a foreign corporation committing any act in the State contrary to the laws of policy thereof should not be permitted to recover thereupon. In order to ascertain the public policy of the State, it is necessary to look at its statutes and judicial decisions. This question was expressly decided against respondent by the Supreme Court

of Mississippi in the case of *State ex rel. Attorney-General v. Edward Hines Lumber Co. et al.*, 106 Miss. 780, 64 So. 729. In that case it appeared that Section 903, Mississippi 1906 Code limited the amount of property which any domestic corporation might own and provided a penalty therefor. The appellee in that case, a foreign corporation, acquired and owned property in excess of the statutory limit. Suit was brought by the Attorney-General to confiscate the property and was met with the defense that the prohibition applied only to domestic corporations and that a foreign corporation was not therein included. A copy of Section 903, Mississippi 1906 Code, is made Appendix 9 hereto. The Supreme Court of Mississippi, construing Section 849 of the Code of 1892 and Section 914 of the Code of 1906, said sections being in identical language with Section 5344, Mississippi Code of 1942, made Appendix "D" to the Petition for Certiorari, held that the appellee, a foreign corporation, was included within the prohibition and violated the public policy of the State of Mississippi. The court used the following language:

> "It seems clear to us that, inasmuch as foreign corporations 'may not do or commit any act in this state contrary to the laws or the policy thereof', it necessarily follows that such corporations may not do in this State what domestic corporations are prohibited from doing. The policy of this State with reference to limitations upon the value of corporate holdings is expressed in our statutes, and while it may be said that section 849 of the Code of 1892 and section 914 of the Code of 1906 are declaratory of the common-law rule of comity, yet it seems to us that, the laws and policy of this State being to limit the value of the holdings of domestic corporations, and to penalize domestic corporations for exceeding the statutory limit, it was the intention of the legislature to apply to foreign corporations the same limitations; otherwise, this policy could be

thwarted by the simple expedient of incorporating in other states.

"If the limitation is not an expression of the State's policy, binding upon all corporations and enforceable by a proper proceeding, foreign corporations would be free to gobble up all of the lands of the State, and thus defeat the effort of the legislature to carry out a wise and salutory purpose, clearly indicated by statutes forbidding corporations subject to its control from acquiring lands in excess of a fixed limit of value. There can be no doubt of the legislative intention to limit the size of corporations in this State, and it is difficult to imagine what laws and policies are referred to in section 849, Code 1892, and section 914, Code 1906, unless we construe these sections to mean that foreign corporations doing business here may also be forced to conform to the policy of the State, expressed in its statutes."

In the case of *United States* v. *Musgrave*, 160 Fed. 700, the Court used the following language:

"The public policy of the government is not limited to such matters as are universally considered as injurious to the public interests, but any acts reasonably calculated to have that effect may be prohibited by statute, and thereupon they are against public policy. United States *v.* Freight Association, 166 U. S. 290, 340, 17 Sup. Ct. 540, 41 L. Ed. 1007; Logan & Bryan *v.* Postal Tel. Co. (C. C.) 157 Fed. 570, 587.

"In the Freight Association Case the court, speaking by Mr. Justice Peckman, said on the subject:

"'The public policy of the government is to be found in its statutes, or when they have not yet spoken, then in the decisions of the courts and the constant practice of the government officials; but when the lawmaking power speaks upon a particular subject over which it has constitutional power to legislate, public policy in such a case is what the statute enacts.'"

In the case of *Angel* v. *Butlington*, 330 U. S. 183, 91 L. Ed. 832, the Court held that a State statute upheld by the highest court of the State is expressive of the public policy of the State. In support of this principle, respondent cites the case of *C. B. & Q. Ry. Co.* v. *Maguire*, 219 U. S. 549, 55 L. Ed. 328, where the following language is used:

> "The legislature, provided it acts within its constitutional authority, is the arbiter of the public policy of the State. While the court, unaided by legislative declaration and applying the principles of the common law, may uphold or condemn contracts in the light of what is conceived to be public policy, its determination as a rule for future action must yield to the legislative will when expressed in accordance with the organic law * * *"

Counsel cite the case of *May* v. *Mulligan*, 36 F. Supp. 596, upon the question of public policy. The following rule is announced at Page 598:

> "'The public policy of a State, established either by express legislative enactment or by the decisions of its courts, is supreme and when once established will not, as a rule, be relaxed even on the ground of comity to enforce contracts, which, though valid where made, contravene public policy.
>
> "'Courts which declare a contract void as against public policy are not declaring the intention of the parties, as in the ordinary case, but are acting under the obligation of the higher law, which requires the enforcement of that which is for the public good. * * *'"

In the case of *Tademy* v. *Scott*, Fifth Circuit, 157 Fed. (2d) 826, the court held that the public policy of the State must be ascertained by consulting the statutes of the State.

In the case of *Bank of Augusta* v. *Earl*, 13 Pet. 519, 10 L. Ed. 274, this Court held that the public policy of a State is to be found in its statutes.

In the case of *New York Life Insurance Company* v. *Craven*, 178 U. S. 349, 46 L. Ed. 1116, this Court held that the public policy of a State is to be found in its statutes and decisions of its courts which are binding upon the Federal court. The same is held in the case of *Hartford Fire Insurance Company* v. *Chicago M. & St. Paul Railroad Co.*, 175 U. S. 91, 44 L. Ed. 84.

Respondent's counsel present the view that the Mississippi statutes are purely for the purpose of collecting revenue. These statutes were enacted in the exercise of the police power of the State. It had the right absolutely, either with or without reason, to exclude a foreign corporation from doing business in the State. *Atlantic Refining Company* v. *Virginia*, 302 U. S. 22, 82 L. Ed. 24; *State of Washington ex rel.* v. *Superior*, 289 U. S. 361, 77 L. Ed. 1256; *Hartford Fire Insurance Company* v. *Carr*, 272 U. S. 494, 71 L. Ed. 372.

A foreign corporation is required to file copy of its charter in order to furnish evidence of its existence, the officers and incorporators, its financial condition, and to protect parties dealing with said corporation from fraud and imposition. *Evans* v. *Lee* (Nev.) 11 Nev. 194; *Cochran* v. *Kingsley*, 25 Col. App. 89; *Dearborn Foundry Company* v. *Augustine*, 5 Wash. 67, 31 Pac. 327.

The purpose of requiring appointment of an agent for service of process is to provide definite means of obtaining the service of process on the foreign corporation. *Dearborn Foundry Company* v. *Augustine*, 5 Wash. 67, 31 Pac. 527; *Hosteter* v. *Jewel*, 73 Iowa 169, 39 Pac. 194; *Zochrim* v. *Redemption Gold Corporation*, 200 Minn. 383, 274 N. W. 536; *Alcorn Combustion* v. *Kellogg*, 295 Pa. 232, 145 Atl. 325; *Oklahoma Packing Company* v. *Oklahoma Gas & Electric Company*, 100 Fed. (2d) 770, Affirmed 309 U. S. 4, 84 L. Ed. 537.

Section 5344, Mississippi 1942 Code, is plain, unambiguous and all embracing. A contract entered into in violation of the laws of the State is unenforceable in any court. The respondent confessedly violated Sections 5319 and 5343, Mississippi 1942 Code, in making contracts sued on and, therefore, the contracts were made in violation of law and in violation of the public policy of the State. Therefore, the contracts sued upon are not enforceable either in the State or Federal court and the petitioner, for a defense thereto in the State court, may not be deprived thereof by removal of the case to the Federal court or instituting this suit in the Federal court.

POINT II

The contracts sued upon are unenforceable in the federal court whether the contracts are absolutely void or merely unenforceable because of the failure of the respondent to qualify to do business in the state.

Under the Act of 1789 in F. S. C. A. 28, 725, as construed in *Swift* v. *Tyson*, the Federal court sitting in the State was obliged to give effect to State statutes and local laws. The case of *Erie Railroad Company* v. *Tompkins* broadened the scope of inquiry to be had in the Federal court as to the State law.

In the case of *Ruhlin* v. *New York Life Insurance Company*, 304 U. S. 204, 82 L. Ed. 1290, the court used the following language:

> "'Application of the 'State law' to the present case, or any other controversy controlled by *Erie R. Co.* v. *Tompkins*, does not present the disputants with duties difficult or strange. The parties and the Federal courts must now search for and apply the entire body of substantive law governing an identical action in the State courts. Hitherto, even in what were termed

> matters of 'general' law, counsel had to investigate the enactments of the State legislature. Now they must merely broaden their inquiry to include the decisions of the State courts, just as they would in a case tried in the State court, and just as they have always done in actions brought in the Federal courts involving what were known as matters of "local' law."

Narrowing the issues to the least common denominator, the precise question presented is as to whether or not the respondent might have recovered upon the contracts in question in the State court. It being conceded that no such recovery could be had, it is immaterial whether contracts are absolutely void or merely unenforceable. The respondent could not walk across the street to the Federal court and obtain the benefit of a different system of jurisprudence. The respondent could not escape the Mississippi statutes and public policy of the State by going into the Federal court. There is but one exception to this rule and that is that a statute would not be in force in the Federal court which was purely procedural. In the Mississippi statutes is found the substantive law of the State upon the question. Under such statutes, the respondent may not enforce the contracts either in the State or the Federal court. The petitioner has a complete defense thereto in either court. This cause is foreclosed in the case of *Guaranty Bank & Trust Co.* v. *York*. In Stumber, Conflict of Laws, 128, the following rule is announced:

> "It may be stated thus: procedural rules are those which concern methods of presenting to a court the operative facts upon which the legal relations depend; substantive rules, those which concern the legal effect of those facts after they have been established."

Procedural involves the methods of continuing litigation and judicial procedures. *Brenizer* v. *Nashville R. R. Co.*,

156 Tenn. 479, 3 S. W. (2d) 1053, 8 S. W. (2d) 1099. Procedural is merely the machinery for carrying on a suit, *Taylor* v. *Reg.* 1 Can 65. Substantive law relates to rights and duties which give rights to a cause of action. Procedural is the machinery for carrying on the suit. *Jones* v. *Erie R. R. Co.*, 106 Ohio State, 408, 140 N. E. 366. In the case of *State* v. *Pavelich Washington*, 279 Pac. 1102, the distinction is drawn in the following language:

> "Although the distinction between procedure and substantive law is not always well understood, and is sometimes vague and indistinct, substantive law is well defined in *Nix* v. Nez Perce County, 18 Ida. 695, 112 P. 215, 32 L. R. A. N. S. 534, as that part of the law which creates, defines and regulates rights as opposed to adjective or remedial law, which prescribes the method of enforcing rights, or of obtaining redress for their invasion. It is difficult, therefore, to draw the line in any particular case, beyond which legislative power, over remedy and procedure, cannot pass without touching upon the substantial rights of the parties affected, as it is impossible to fix that boundary by any general condition."

In the case of *Lachman* v. *Penn. Greyhound Lines, Inc.* (2d Cir.), 160 Fed. (2d) 496, the court said:

> "The line between substance and procedure is not so clearly marked as to be free from doubt in all cases, and the decisions have been influenced by the desire to effectuate the spirit of the doctrine of Erie R. Co. v. Tompkins so as to secure uniformity in the results to be obtained in the State courts and in the Federal courts in diversity cases in each State. This is especially desirable when the remedial law of the State is so closely associated and incorporated with its substantive law as to be necessary in order to maintain and validate the latter. Precourt v. Driscoll, 85 N. H. 280, 157 A. 525, 78 A. L. R. 874."

In *Guaranty Trust Company* v. *York*, 326 U. S. 99, 89 L. Ed. 2079, the court held that a State statute of limitations was substantive law.

In the case of *Palmer* v. *Hoffman*, 318 U. S. 109, 87 L. Ed. 645, 145 A. L. R. 719, the court held that the burden of proof was part of the substantive law of the State.

In the case of *Stone* v. *New York Life Insurance Co.*, 311 U. S. 464, 85 L. Ed. 284, the court held that whether or not there was sufficient proof to justify a recovery was a matter of substantive law of the State.

In the case of *Central Vermont Railway Company* v. *Mary Theresa White*, 238 U. S. 507, 59 L. Ed. 1433, Mr. Justice Lamar used the following language announcing the rule that the burden of proof was part of the substantive law of the State:

> "But it is a misnomer to say that the question as to the burden of proof as to contributory negligence is a mere matter of State procedure. For, in Vermont, and in a few other States, proof of plaintiff's freedom from fault is a part of the very substance of his case. He must not only satisfy the jury (1) that he was injured by the negligence of the defendant, but he must go further, and, as a condition of his right to recover, must also show (2) that he was not guilty of contributory negligence. In those states the plaintiff is as much under the necessity of proving one of these facts as the other; and as to neither can it be said that the burden is imposed by a rule of procedure, since it arises out of the general obligation imposed upon every plaintiff, to establish all of the facts necessary to make out his cause of action."

A very interesting case is that of *John Hancock Mutual Life Insurance Company* v. *Yates*, 299 U. S. 178, 81 L. Ed. 106. In that case the respondent's husband took out a policy of life insurance in which the respondent was named

as beneficiary. He made an application in which false representations were made in regard to his having been treated by a physician prior to applying for the policy. The insured died very soon after the policy was taken out and the beneficiary, the respondent, moved to the State of Georgia, where suit was brought upon the policy. Under the statutes of the State of New York as construed by its highest appellate court, the policy and the application therefor constituted the entire contract between the parties and oral testimony was not admissible to show that correct answers were given to the agent who took the insured's application but that such answers were not correctly taken down. The plaintiff was permitted to prove that the insured made correct answers to the application but that the same were not correctly written down by the company's agent. Judgment was recovered by the respondent, plaintiff, which judgment was affirmed by the highest appellate court of the State upon the theory that the question was merely one of procedure governed by the laws of the forum. This Court granted certiorari and, in reversing the case, the court held that the life insurance company was entitled to the benefit of the substantive law of the State of New York. The court used the following language:

> "The reasoning of the Georgia Court, and the conclusion reached by it, are not sound. No question of remedy is presented. The Company sets up as a defense a substantive right conferred by a statute of New York. The contract of insurance was made and the death of the insured occurred in that State. In respect to the accrual of the right asserted under the contract, or liability denied, there was no occurrence, nothing done, to which the law of Georgia could apply. Compare Home Ins. Co. *v.* Dick, 281 U. S. 397, 408, 74 L. Ed. 926, 933, 50 S. Ct. 338, 74 A. L. R. 701. To sustain the defense involves merely recognition by the courts of Georgia that the parties have by their con-

tract made in New York subjected themselves to certain conditions prescribed by its statute. Such recognition does not give to the New York statute extra-territorial effect. The statute of New York prescribes, or limits, the things which will be effective to create binding contracts of insurance, or terms in them. As construed by the highest court of the State, the statute makes the policy with the application annexed the entire contract between the parties. And it declares that a false answer in the application to the precise question here involved is a material misrepresentation which avoids the policy; and that the fact that a truthful answer was orally given to the agent but not recorded is without legal significance. In so declaring, the statute enacts a rule of substantive law which became a term of the contract, as much so as the amount of the premium to be paid or the time of its payment. The declaration by the statute as construed and applied by the highest court of New York that the false answer here involved is a material misrepresentation which avoids the policy determines the substantive rights of the parties as fully as if a provision to that effect had been embodied in writing in the policy. To refuse to give that defense effect would irremediably subject the Company to liability."

It is very true that the court gave effect to the constitutional provision that full faith and credit should be given in the State of Georgia to the laws and the statutes of the State of New York which carried with it, however, the conclusion that the rights under the New York statute as to the admission of the evidence under the New York laws was not procedural but created substantive rights.

Now neither may it be said that the Mississippi statute merely precluded action in the State court. It is very true that Section 5319, Mississippi 1942 Code, provides that the foreign corporation failing to comply should not be permitted to bring or maintain an action or suit in any of the

courts of the State. At the time this statute was passed, and for many years prior thereto, the authorities uniformly held that the Federal court was a State court in the District in which it sat.

Ex Parte Schoenberger, 96 U. S. 369, 24 L. Ed. 853; *Great Southern Life Insurance Co.* v. *Burwell* (5th Cir.), 12 Fed. (2d) 244.

In the case of *Sullivan* v. *Title Guarantee and Trust Company* (2d Cir.), 167 Fed. (2d) 393, the court used the following language:

> "As we have been often advised, a federal court in a diversity suit 'should adjudicate controversies as it were only another state court'. Vanston Bondholders Protective Committee *v.* Green, 329 U. S. 156, 162, 67 S. Ct. 237; Holmberg *v.* Armbrecht, 327 U. S. 392, 394, 66 S. Ct. 582, 90 L. Ed. 743, 162, A. L. R., 719; Guaranty Trust Co. *v.* York, 326 U. S. 99, 108, 109, 65 S. Ct. 1464, 89 L. Ed. 2079, 160 A. L. R. 1231."

In the case of *Holmberg v. Armbrecht*, 327 U. S. 392, 90 L. Ed. 743, at Page 746, the court announced the following rule:

> "For purposes of diversity suits a Federal court is, in effect, 'only another court of the State'. Guaranty Trust Co. *v.* York, supra (326 U. S. at 108, 89 L. Ed. 2086, 65 S. Ct. 1464, 160 A. L. R. 1231)."

This argument, however, does not take into consideration Section 5344 of the Mississippi Code of 1942, which provides that where a foreign corporation violates the law or public policy of states, it may not sue in any court. The Mississippi statute involved in no manner restricts the jurisdiction of federal courts. No statute of Mississippi could prevent the respondent from going into the Federal court to enforce a right or from removing the

case from a State Court to the Federal Court. *Barrow v. Kane*, 170 U. S. 100, 42 L. Ed. 964; *Tom J. Terral v. Burk Construction Co.*, 257 U. S. 529, 66 L. Ed. 352, 21 A. L. R. 186; *Southern R. R. Co. v. Allison*, 190 U. S. 326. The Mississippi statutes did not prevent the respondent from filing a suit in the Federal Court. The respondent availed itself of its constitutional right to do so and was heard; however, when it filed its suit in Federal court, it was face to face with the state law, the same jurisprudence prevailed in the Federal court as would have confronted the respondent in the State court. It could not convert an unenforceable right of action into a valid cause of action by going across the street and filing its suit in the Federal court. There was no question of lack of jurisdiction but failure to have a cause of action.

In the case of *Wabash R. Co. v. Duncan* (8th Cir.) 170 Fed. (2d) 38, the following language is used at Page 41:

> "'Jurisdiction is the right to put the wheels of justice in motion and to proceed to the final determination of a cause upon the pleadings and evidence . . . It may undoubtedly be shown in defense that plaintiff has no right under the allegations of his bill or the facts of the case to bring suit, but that is no defect of jurisdiction, but of title'. Illinois Central Railroad Co. *v.* Adams, 180 U. S. 28, 34, 21 S. Ct. 251, 253, 45 L. Ed. 410. See also Walling *v.* Miller, 8 Cir., 138 F. 2d 629, 631, and cases cited."

The jurisdiction of the Federal court in this case was perfect. There was diversity of citizenship and a demand in good faith for an amount in excess of $3,000.00 exclusive of interest and costs. The question as to whether or not the respondent, a foreign corporation, had entered into contracts in Mississippi which were illegal and unenforceable because in violation of the laws and public policy of

the state was purely defensive. The respondent was afforded the opportunity and had the right to litigate and have the court determine as to whether or not it had transacted business in the state without qualifying. Its failure to recover had no relation to the jurisdiction of the court but rather the fact that the causes of action asserted were unenforceable and that the petitioner had a perfect defense thereto which he set up and established with proof. In no case construing its statutes has the Supreme Court of Mississippi held that the question was one of jurisdiction. If the respondent had recovered a judgment by default, the judgment would have been unassailable. The Supreme Court of Mississippi has never held that it was necessary for a foreign corporation to allege its compliance with the laws of the State of Mississippi and on a complaint containing no such allegation, it would be the duty of the defendant in its pleadings to set up such defense.

It may be very true that in the instant case the contract was enforceable at the instance of the petitioner. Ordinarily, the petitioner would have no knowledge that the foreign corporation had not complied with the laws of the state and would have the right to assume that it had done so. It would be under no duty to make inquiry in respect thereto. However, in the event that it should appear that the resident had procured the admission of the foreign corporation without its qualifying under the laws of the state, the Supreme Court of Mississippi has never held that a citizen of the state, under such circumstances, could enforce the contract against the foreign corporation. This point is well illustrated in the case of *Newell Construction Company* v. *State Highway Commission*, 15 So. (2d) 700, 195 Miss. 395, where suit was brought by an unqualified foreign corporation. The court held that although the

suit had been pending for three years and testimony had been taken for twenty days; the trial court committed no error in permitting the defendant to plead defensively the failure of the foreign corporation to qualify under the law. The court used the following language:

"Then, in the second place, it is strenuously urged that the trial court abused its discretion in permitting the amendment to be made so as to allow this defense to be interposed, for the reason that the leave to amend was not seasonably applied for. However, inasmuch as Section 4140 expressly requires that every foreign corporation doing business in the State of Mississippi shall file a written power of attorney designating the Secretary of State, or in lieu thereof some other resident agent, upon whom service of process may be had, before it is authorized to do business in this state, and further provides that 'Any foreign corporation failing to comply with the above provisions shall not be permitted to bring or maintain any action or suit in any of the courts of this state'; and since Section 4164 requires such a corporation to file a copy of its charter or articles of incorporation with the Secretary of State, and provides that 'any foreign corporation which shall not file a copy of its charter or certificate of articles of incorporation . . . shall be liable to a fine of not less than $100.00'; we are of the opinion that the defendant, State Highway Commission, had the right to assume, without making any investigation in that behalf, that the complainant, as such a foreign corporation, had complied with the plain mandates of the law in these particulars, and that therefore the trial court was not in error in permitting the amendment so as to allow the defense to be made so as to show that the contract sued on was wholly void and unenforceable, and this is especially true in the absence of a showing that the defendant had notice of the non-compliance with the statutes prior to the taking of the evidence by the complainant in

support of the allegations of its bill of complaint. When this suit was filed and the evidence was being taken, the complainant was charged with knowledge that it could not bring or maintain any action or suit in any of the courts of this state without having complied with these statutes before doing the business in this state, since it is presumed to have known, before it brought the suit or incurred any of the expense of the trial, all of the facts in connection with its failure to file a copy of its charter and designate an agent for the service of process as required by law.

"The decree of the court below must therefore be affirmed.

"Affirmed."

From this case, it appears that the question was not one of jurisdiction but was a defense to be pleaded by the defendant; that the party dealing with the foreign corporation had a right to assume that it complied with the laws of the state. It is apparent from the opinion, however, that if the defendant wished to take advantage of this defense and had knowledge of the facts, it should plead to the same promptly.

It may be noted that the Supreme Court referred to the contract of the foreign corporation as being *wholly void*. In the case of *Midland Linseed Products Company* v. *Warren Brothers Company*, Sixth Circuit, 46 Fed. (2d) 870, the court held that effect must be given to the latest decisions of the Supreme Court of the state.

We respectfully submit that the Court of Appeals committed error in reversing the judgment of the District Court for the Northern District of Mississippi and that the judgment of the Circuit Court of Appeals as well as its judgment adhering to its judgment of reversal should be re-

versed, the cause remanded, and the judgment of the District Judge reinstated and affirmed.

Respectfully submitted,

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Jackson, Mississippi;
JAMES McCLURE,
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JOHN W. KYLE,
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Counsel for Petitioner.

APPENDIX 1

Opinion of the Court

It seems to me, gentlemen, to determine the question as to whether the plaintiff in this case was doing business in the State of Mississippi, it is only necessary to consider the immediate transaction before the Court.

It is admitted by the stipulations in this case that the contract of employment in this case was entered into in Mississippi; that the landholder whose land is alleged to have been contracted to be sold is a citizen of the state of Mississippi; that the entire transaction took place in Mississippi with a resident of Mississippi. That in itself seems to me beyond question to constitute doing business in Mississippi. But if we must proceed further than that, the stipulations would show that thousands of dollars worth of business had been done for years, that over a period of years numerous sales and transactions had taken place; that in an organization which sold land in Arkansas, Tennessee, Mississippi, Missouri and Kentucky, that some eight to ten percent of their business arose from transactions in Mississippi. Their agents came into Mississippi, they made contracts in Mississippi; they showed land in Mississippi; they made contracts for sales and consummated sales here. That, in my judgment, is clearly doing business under the Mississippi law.

The case against the Memphis Publishing Company I do not think is in point at all with this case. In that case the Court was struggling with what proportion of an integrated business was done in Mississippi or without Mississippi. The Memphis Publishing Corporation is the publisher of a great newspaper. Their plant is without question located in the city of Memphis, where the newspaper is published. What the Court was trying to arrive at was whether they were doing business in this State by sending papers into it and having agents working there under it, not comparable to this at all, because this is merely a situation involving the sale of land and the entire transaction could be completed in Mississippi.

The sole question which remains to be determined in this case is whether or not under the Mississippi statute these contracts are void. There is no question that the Mississippi Legislature has a right to say that they might not use the Courts of the State of Mississippi to enforce them. They could not say that the Federal Courts would not take jurisdiction, but the mere effect of the statute is to say that Mississippi Courts may not assume jurisdiction. They have approached that problem, as I see it, in two ways. They have on certain occasions, as in the Marx & Bensdorf case and others, invoked one part of the statute and simply said you cannot use the Mississippi Courts to enforce this, and dismissed it on that ground. But in the Haygood case the Court approached the problem from a different angle, and in that case rather than to say that the Mississippi State Courts particularly cannot enforce these contracts, they went into what seems to me to be decision and not dicta, to the extent that they said these statutes made these contracts utterly void in this State and contrary to the public policy of the State. I could not personally agree that that is what the statute meant, but I am bound by the decision of the Supreme Court of Mississippi as to what the Mississippi statutes mean, and the Federal Courts are bound by them. I think that was not dicta. The Court had a right to decide it on that point if they wanted to. I have not seen any decision of the Mississippi Supreme Court which has criticized the Haygood case, or in any way reversed the Haygood case. I think it is the law in Mississippi under the Haygood case that these contracts are void. Being void, there would be no right in this Court or any other Court to enforce them.

The motion to dismiss, or for a summary judgment, would be sustained.

APPENDIX 2

Opinion of the Court

No. 12,259

INTERSTATE REALTY COMPANY

vs.

WOOD

Before Sibley and Lee, Circuit Judges, and Christenberry, District Judge

LEE, *Circuit Judge:*

This suit was filed by the appellant, a Tennessee corportation, to recover from appellee, a resident of Mississippi, a broker's commission alleged to be due on the sale of certain of appellee's real estate in the State of Mississippi. Appellee in his answer denied the right of appellant to recover, setting up that appellant was a foreign corporation which, because it had never qualified to do business in the State of Mississippi as provided by Mississippi law, was not entitled to maintain any suit in any court in Mississippi. After filing his answer, the appellee called upon appellant to admit, pursuant to Federal Rules of Civil Progedure, Rule 36, 28 U. S. C. A. following section 723c, that it had not qualified to do business in Mississippi. In response, appellant denied that it was doing business in Mississippi, but admitted a number of transactions in that State over a specific period of years. Upon this admission, the court below, on motion for summary judgment, found that appellant was doing business in Mississippi and held that the contract in question was void. Judgment was thereupon entered dismissing the plaintiff's suit with prejudice. This appeal followed.

The two questions involved are (1) Was appellant doing business in Mississippi within the purview of the statutes? and (2) if so, was the contract with appellee which was entered into in Mississippi null and void because appellant at that time had not qualified to do business in Mississippi?

(1) The record shows that appellant is a corporation organized under the laws of the State of Tennessee, with its domicile in Memphis, Tenn., and that it had never qualified to do business in Mississippi. Through its agents, however, it had contracted to sell real estate in Mississippi and in connection with sales had sent its agents into Mississippi to meet prospective buyers and to show the properties to be sold. Appellant admitted that in 1942 it earned from 3 sales in Mississippi $2,121.45; in 1943, from 2 sales, $4,064.25; in 1944, from 3 sales $12,000; in 1945, from 14 sales, $14,272.27; and in 1946 from 16 sales, $14,430.75. We think that in view of these admissions the court below was correct in holding that appellant was doing business in Mississippi within the meaning of the Mississippi statutes. Marx & Bensdorf, Inc. *v.* First Joint Stock Land Bank of New Orleans, 178 Miss. 345, 173 So. 297; Wiley Electric Co. *v.* Electric Storage Battery Co., 167 Miss. 842, 147 So. 773.

The question remaining is whether or not appellant's failure to qualify to do business in Mississippi struck with nullity the contract sued upon in this case. The pertinent sections of the Mississippi law are set forth in the margin.

The court below rested its decision upon Quartette Music Co. *v.* Haygood, 108 Miss. 755, 67 So. 211, 212, and held that under that case the contract here sued upon was null and void because at the time of contracting the appellant had not qualified to do business in the State of Mississippi. In so holding we think the court erred.

In the Haygood case the plaintiff was a Texas corporation and brought suit in the Circuit Court of Lee County, Mississippi, against J. L. Haygood and G. W. Long on a promissory note signed by them in the sum of $225. The defendant moved to dismiss, setting forth that the plaintiff was a foreign corporation and had not qualified to do business in Mississippi and that the note sued upon was the consideration for business done by the corporation in Mississippi. Plaintiff demurred to the plea on the ground that the law referred to was unconstitutional and that the plea did not state sufficient grounds for a dismissal. The trial court overruled the demurrer and dismissed the plaintiff's suit, and the

plaintiff appealed. The Supreme Court affirmed and, citing an earlier Mississippi case said:

"'Every contract made for, or about, any matter or thing which is prohibited and made unlawful by any statute, is a void contract, though the statute itself does not mention that it shall be so, but only inflicts a penalty on the defaulter, because a penalty implies a prohibition, though there are no prohibitory words in the statute.'

"There are some decisions in our books which apparently conflict with this rule, but they were all overruled by Woodson *v.* Hopkins, 85 Miss. 171, 37 So. 1000, 38 So. 298, 70 L. R. A. 645, 107 Am. St. Rep. 275."

The latest case called to our attention from the Mississippi Supreme Court on the subject is Newell Contracting Co. *v.* State Highway Commission, 195 Miss. 395, 15 So. 2d 700, 702. There the court said:

"We are of the opinion that the court below was correct in holding that the appellant was doing business in this State and that there had been no substantial compliance with the statutes here involved until September 16, 1933, and that hence the contract sued on is void and unenforcible. Quartette Music Co. *v.* Haygood, 108 Miss. 755, 67 So. 211; Peterman Construction & Supply Co. *v.* Blumenfeld, 156 Miss. 55, 125 So. 548; Wiley Electric Co. *v.* Electric Storage Battery Co., 167 Miss. 842, 147 So. 773; Marx & Bensdorf, Inc. *v.* First Joint Stock Land Bank of New Orleans, 178 Miss. 345, 173 So. 297; Case *v.* Mills Novelty Co., 187 Miss. 673, 193 So. 625, 126 A. L. R. 1102" (Emphasis ours).

Whether the court in using the word "void" meant absolutely null, or void in the sense of unenforceable, the opinion does not make clear. Citation of the *Haygood* case would indicate that the court was of the opinion that the contract was absolutely null; but citation of the other cases, all of them opinions by the Supreme Court of Mississippi later in date than the *Haygood* case, would indicate that the court meant that the contract was "void" only in the sense that it was unenforceable in the Mississippi courts.

In Peterman Construction & Supply Co. *v.* Blumenfeld, supra, the Supreme Court of Mississippi said (156 Miss. 55, 125 So. 550):

". . . we think the case is controlled by Quartette Music Co. *v.* Haygood, supra, in which it is said that a contract made without first complying with the provisions of the above quoted statute could not be enforced in the courts of this State.

"That is the policy of this State, and while this case appears to be hard, in that finally the foreign corporation did comply with the law, yet in so far as it affects this contract the compliance cannot be made to relate back to the date of its execution. It was either enforceable on the date of its execution, or unenforceable. Under the statute, as construed by this court, the contract was not enforceable on its execution, and when the one contract was signed it was, in effect, a volume of business already transacted amounting to 200 separate and distinct contracts, in so far as the relation created between the foreign corporation and the several subscribers is concerned. . . ."

In Wiley Electric Co. *v.* Electric Storage Battery Co., supra, the Supreme Court of Mississippi said (167 Miss. 842, 147 So. 777):

". . . This statute closes the doors of the courts of this state to foreign corporations doing business in this State in violation of its provisions, consequently upon the proof in this record we think the suit should have been dismissed."

In Marx & Bensdorf, Inc. *v.* First Joint Stock Land Bank, supra, the Supreme Court of Mississippi in referring to the statute used the following language (178 Miss. 345, 173 So. 208):

". . . It will be noted that the last clause of that paragraph provides that any foreign corporation failing to comply therewith is barred from bringing and maintaining any suit in the courts of this state."

In Case *v.* Mills Novelty Co., supra, the Supreme Court of Mississippi said (187 Miss. 673, 193 So. 626):

"The servicing of this ice cream dispenser was purely a local transaction, not incidental to or necessary for the formation of the sales contract, and was subject wholly to the supervision and control of the State. It necessarily follows therefore that when servicing this ice cream dispenser, which it did through an agent employed for that purpose, the appellee was doing business in this State, and the contract of which this service agreement is a part violated Section 4164, Code of 1930, and is unenforceable."

(2). We think the cases cited in the *Newell Contracting Co.* case, with the exception of the *Haygood* case, all indicate that under the Mississippi statutes the prohibition merely closes the door of the State courts to a foreign corporation which has failed to qualify to do business in that State. That this is the true interpretation of the Mississippi law is made clear in Long Beach Canning Co. *v.* Clark, 1926, 141 Miss. 177, 106, So. 646, and Citizens' Bank of Hattiesburg *v.* Grigsby, 1934, 170 Miss. 655, 155 So. 684. In Long Beach Canning Co. *v.* Clark, supra, the Supreme Court of Mississippi said (141 Miss. 177, 106 So. 648):

". . . . In Quartette Music Co. *v.* Haygood, 108 Miss. 755, 67 So. 211, it was held that a foreign corporation doing business in this State, which had not filed its charter as required by this section, could not enforce its obligations in the courts of this State.

". . . . . .

"The statute does not make a forfeiture of property to the state for the failure to record its charter. It simply refuses the aid of its courts to those doing business in violation of the law without recording their charter."

In Citizens' Bank of Hattiesburg *v.* Grigsby, supra, the Mississippi Supreme Court said (170 Miss. 655, 155 So. 685):

"It is next contended that the contract was void, and that no validity can be given to the deed under the foreclosure. It will be noted, in considering this contention,

that the Franklin Bond & Mortgage Company is not a party to the suit, is seeking no relief in court, and has sought none. The statute bearing on the matter denies, to a corporation violating the statute, access to the courts for any relief. We do not think the statute avoids the contract so as to affect third persons, and we are of the opinion that nobody can raise this question but the state of Mississippi, when suit is brought by third persons, or when the litigation is between other persons than the corporation violating the statute and the state of Mississippi. In other words, a sale under a deed of trust in pais passes the title from the trustee to the purchaser. In the original contract between the Franklin Bond & Mortgage Company and Williams the title passed from Williams to the trustee. The language of the statute does not make the contract entirely void. See Middleton *v.* Georgetown Mercantile Co., 117 Miss. 134, 77 So. 956; Long Beach Canning Co. *v.* Clark, 141 Miss. 177, 106 So. 646; Nicholson *v.* Myres, 170 Miss. 441, 154 So. 282; Quitman County *v.* Stritze, 70 Miss. 320, 13 So. 36; and the authorities cited under these cases. See also, Springfield Grocery Co. *v.* Devitt, 126 Miss. 169, 88 So. 479.

"In our opinion, the case of Long Beach Canning Co. *v.* Clark, supra, is applicable here. In that case it was held, where a foreign corporation did business in this state without filing its charter as required by Section 945, Code 1906 (which is brought forward in the Code of 1930, section 4164), that this did not prevent it from selling property to liquidate its affairs on discontinuing its business, and that the statute prohibiting a foreign corporation from transacting business unless its charter was filed was intended only to deny such foreign corporation access to the courts of the state to enforce rights growing out of business transacted contrary to the statute. It would be too sweeping a decision to hold that the contract was utterly void as to third persons, and it would impose an unreasonable burden on other parties to compel them to see to it that a corporation had complied with the law of the state, when they desired to buy the property of such corporations."

When, therefore, the court in the Newell case used the words "void and unenforcible," we must interpret "void"

as meaning that no relief could be granted to a noncomplying foreign corporation in view of the statute. Supposing a Mississippi resident had sued a nonresident corporation in the Mississippi court for breach of contract, the contract having been entered into in Mississippi, would it be contended that the nonresident corporation could set up that since it had not qualified to do business in the State of Mississippi the contract entered into was void? We think not. The Mississippi statutes deny to the noncomplying corporation permission to bring a suit in the State courts; but they do not prevent such a corporation from being sued upon its contracts in the State courts.

(3, 4) But the prohibition in the State law closing the doors of the State courts extends no further than the State courts. The State of Mississippi is without authority to limit or extend the jurisdiction of the federal courts. If diversity of citizenship exists, the fact that a foreign corporation may not sue in the State courts because it has not complied with the conditions of doing business within the State does not shut the doors of the federal court sitting in that State. See David Lupton's Sons Co. *v.* Automobile Club of America, 225 U. S. 489, 32 St. Ct. 711, 56 L. Ed. 1177, Ann. Cas. 1914A, 699; McLean *v.* York Oil Field Supply Co., Inc., 5 Cir., 138 F. 2d 802; Butler Bros. Shoe Co. *v.* U. S. Rubber Co., 8 Cir., 156 F. 1; Groton Bridge & Mfg. Co. *v.* Amer. Bridge Co., C. C. N. Y., 151 F. 871, 876, 877.

We therefore hold that the appellant has the right to sue on its contract in the Federal District Court sitting in Mississippi.

The judgment appealed from is reversed.

APPENDIX 3

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 12259

INTERSTATE REALTY COMPANY, *Appellant*,

vs.

J. S. WOODS, *Appellee*

Appeal for the District Court of the United States for the Northern District of Mississippi

(October 22, 1948)

On Petition for Rehearing

Before Sibley and Lee, Circuit Judges, and Christenberry, District Judge

Per CURIAM:

A rehearing is granted restricted to the question whether, in a diversity case, the doors of the federal court sitting in Mississippi are shut to a foreign corporation which may not sue in the state court because it has not complied with the condition for doing business within the state, the rehearing to be submitted upon briefs previously filed and to be filed on or before November 15, 1948.

APPENDIX 4

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 12259

INTERSTATE REALTY COMPANY, *Appellant*,

vs.

J. S. WOODS, *Appellee*

Appeal from the District Court of the United States for the Northern District of Mississippi

(November 26, 1948)

On Rehearing

Before Sibley and Lee, Circuit Judges, and Christenberry, District Judge

PER CURIAM:

In our original opinion we held that the contract sued upon was not absolutely void but merely unenforceable in the State Court and that by reason of diversity of citizenship the suit may be maintained in the federal court. On application for rehearing, the appellee cited the case of *Angel* v. *Bullington*, 330 U. S. 183, as overruling the case of *David Lupton's Sons Co.* v. *Automobile Club of America*, 225 U. S. 489, 32 S. Ct. 711, 56 L. Ed. 1177, upon which reliance was placed by us to sustain jurisdiction in the federal court. Accordingly, we granted a rehearing, restricted in its application to the question whether a foreign corporation might sue in the federal court when the doors of the State courts were closed to it because it had not complied with the conditions for doing business within the State.

The Supreme Court in the *Bullington* case was concerned with the application of the doctrine of res adjudicata under a North Carolina Statute prohibiting a suit for recovery on a deficiency judgment. What was said in that case about cases like *David Lupton's Sons Co.* v.

Automobile Club, was argumentatory. We do not consider it to have overruled the *David Lupton's Sons Co.* case upon the question with which we are now concerned and with respect to which the *David Lupton's Sons Co.* case expressly dealt.

Entertaining as we do this view, our original opinion and decree reversing the judgment appealed from are affirmed in their entirety and made the judgment of the court on rehearing.

APPENDIX 5

Section 5319, Mississippi Code of 1942

Resident Agent: How Designated.—Every domestic corporation shall maintain an office in the county of its domicile in this state, either in charge of an officer or officers of the corporation, or in charge of some persons or corporation duly designated as resident agent for service of process by the directors (by whatever name called) of such corporation, a duly certified copy of the resolution designating such resident agent, and the written acceptance of such agency by the agent, to be filed with the secretary of state. In the event of the death, resignation or removal of such resident agent, another shall be substituted within thirty days in the same manner and accompanied by the same fee as in the former appointment; and until such substitution, or in event of the failure of a corporation to so designate and qualify a resident agent where one is required by this act, the secretary of state shall be the agent for the service of process upon such corporation without resident agent, until one shall have been designated as herein provided.

Every foreign corporation doing business in the state of Mississippi, whether it has been domesticated or simply authorized to do business within the state of Mississippi shall file a written power of attorney designating the secretary of state or in lieu thereof an agent as above provided in this section, upon whom service of process may be had in the event of any suit against said corporation;

and any foreign corporation doing business in the state of Mississippi shall file such written power of attorney before it shall be domesticated or authorized to do business in this state, and the secretary of state shall be allowed such fees therefor as is (sic) herein provided for designating resident agents. Any foreign corporation failing to comply with the above provisions shall not be permitted to bring or maintain any action or suit in any of the courts of this state.

APPENDIX 6

Section 5339, Mississippi Code of 1942

Foreign Corporations May Be Domesticated.—Every company or corporation incorporated under the laws of any other state, territory or country, now doing business in this state, or hereafter desiring to do business in this state, and desiring to become a domestic corporation in this state, may file with the governor of the state a copy of its charter, or articles of incorporation or association, or in case such company or corporation is incorporated merely be a certificate, then a copy of its certificate of incorporation, duly authenticated and certified under the great seal of the state in which it was incorporated by charter or certificate.

APPENDIX 7

Section 5343, Mississippi Code of 1942

Charters To Be Filed.—Every company or corporation for profit incorporated under or by virtue of the laws of any government, or of any other state or territory, now or hereafter doing business in this state, shall file in the office of the secretary a copy of its charter or articles of incorporation, or in case such company or corporation is incorporated merely by certificate, then a copy of such certificate duly certified and authenticated. Said charters, articles of incorporation or certificates to be filed shall be

duly certified by the president and secretary, or other chief executive of such corporation, and by attaching thereto the corporate seal, and the secretary of state, on the payment of the fees herein provided for shall give certificate that said corporation has filed its charter or articles of incorporation as required by this act, and any foreign corporation which shall not file a copy of its charter or certificate or articles of incorporation, as provided in this act, shall be liable to a fine of not less than $100.00. This section shall not apply to insurance companies, and is not to be taken or construed to change or modify the laws which are directly applicable to the character of corporations.

APPENDIX 8

Section 5344, Mississippi Code of 1942

Foreign Corporations, Powers.—Corporations which exist by the laws of any other state of the Union, by the acts of Congress, or the laws of any foreign country, may sue in this state by their corporate names, and they shall also be liable to be sued or proceeded against, by attachment or otherwise, as individual non-resident debtors may be sued or proceeded against: And the acts of the agents of any such foreign corporation shall have the same force and validity as the acts of agents of private persons; but such foreign corporations shall not do or commit any act in this state contrary to the laws or policy thereof, and shall not be allowed to recover on any contract made in violation of law or public policy.

APPENDIX 9

Section 903, Mississippi Code of 1906.

Limitation on Corporate Holdings—Every corporation of the classes to be or heretofore created under the provisions of this chapter or the laws of this state may hold personal property in any amount necessary and proper

for its uses and purposes, and every such corporation, except manufacturing corporations, may hold lands necessary for its purposes to an amount in value not exceeding one million dollars; manufacturing corporations may hold land to an amount not exceeding two million dollars in value, but building, machinery and other fixtures on such land shall be excluded in valuing land. And a corporation shall not have a trust, use or benefit in property held in the name of any person or corporation for its use either expressly or secretly, to a greater amount than it may lawfully hold, nor shall any corporation employ its capital, money or other thing in any way other than in pursuit of its legitimate business; and a corporation offending against any of these provisions shall forfeit its charter and shall also forfeit to the state all real estate held above that which it may lawfully hold, but an increase in the market value of real estate after it has been acquired by a corporation over the limit it was or is authorized to hold shall not operate to forfeit either the charter or any part of the real estate of such corporation. Nothing herein contained shall prevent a corporation from taking land or a lien on land to a greater amount than it may lawfully hold in payment of or as a security for a debt, if the same shall not be held for a longer period than ten years.

REPLY

BRIEF

FOR

PETITION-

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 465

J. S. WOODS,

Petitioner,

vs.

INTERSTATE REALTY COMPANY,

Respondent

REPLY BRIEF FOR PETITIONER

I

Statement of Facts

The respondent purports to set out the cause of action which it asserts against petitioner. It must, of course, be understood that the statement is taken from respondent's complaint. It is very true that the cause of action as stated in respondent's complaint is as set out in respondent's brief. Turning to Transcript pages 56, 57 and 58 of the Record, it will appear that if the facts were true as alleged in petitioner's answer, the respondent had no right of recovery against petitioner though it abundantly appeared from the record, and is conceded in this case, that whatever the facts may have been in respect to the transactions be-

tween the respondent and petitioner, the respondent was transacting business in the State of Mississippi in violation of its laws and statutes.

II

This case involves a construction of three Mississippi statutes which relate not to the jurisdiction of the court but to the substantive law of the State.

Respondent's counsel are in error in stating that there are only two statutes involved in this case, to-wit: Section 5319 and Section 5344, Mississippi 1942 Code. As a matter of fact, as will appear from petitioner's brief, pages 47, 48 and 49, there are three statutes involved: Section 5319, which required the respondent to appoint an agent for service of process and, upon failure to do so, the statute provided that such foreign corporation should not be permitted to bring or maintain any action or suit in any of the courts of the state; Section 5343, which required a foreign corporation, before transacting any business in the state, to file a certified copy of its charter or articles of incorporation and, upon failure so to do, it was guilty of a misdemeanor and subject to a fine of not less than $100.00; Section 5344, which provided that such foreign corporation shall not do or permit any act contrary to the laws or policy thereof in which event it should not be allowed to recover on any contract made in the state in violation of law or public policy.

The respondent violated Section 5319 by failing to appoint an agent for service of process, violated Section 5343 by failing to file with the Secretary of State a certified copy of its charter or articles of incorporation and was therefore guilty of a misdemeanor and, as a consequence of its violation of Section 5319 and Section 5343, transacted business in Mississippi contrary to the laws and policy thereof and

therefore has no right of action against the petitioner by reason of the contract alleged to have been entered into between petitioner and the respondent in the State of Mississippi. Respondent's counsel say that Section 5319 and Section 5344 do not expressly make contracts entered into in violation thereof void and that, therefore, the respondent's alleged contract entered into with petitioner in the State of Mississippi is not void but is therefore enforceable.

Counsel concede that under the case of *Quartette Music Company* v. *Haygood*, 108 Miss. 755, 67 So. 211, the contract was absolutely null and void. In our original brief at pages 7 and 8, we pointed out that the Supreme Court of Mississippi had held that any contract for or about any matter prohibited and made unlawful was a void contract though the statute itself did not expressly so provide. The court in that opinion overruled previous opinions to the contrary. But counsel say that this rule was changed by the legislature by the passage of Section 5319 above referred to. The case of *Quartette Music Company* v. *Haygood, supra,* had under construction Section 935, Mississippi Code of 1906, in substantially the same language as Section 5343, Mississippi Code of 1942. The enactment of Section 5319 which appeared for the first time as Chapter 90 of the Laws of 1928 in no manner changed the rule announced in the *Quartette Music Company* case. As a matter of fact, the enactment of Chapter 90, Mississippi Laws of 1928, which was substantially the equivalent of Section 5319, added an additional qualification necessary and required of a foreign corporation before it might transact business in the State of Mississippi. The passage of Chapter 90, Mississippi Laws of 1928, brought forward as Section 5319, in no manner altered or modified Section 5343, Mississippi 1942 Code, but left the same in full force and effect. Prior to the pas-

sage of Chapter 90, Mississippi Laws of 1928, brought forward in Section 5319, there was no statute requiring a foreign corporation to appoint an agent for service of process. Upon the other hand, the insurance commissioner was provided as agent for service of process as to insurance companies and there was no statute providing for appointment of agent for service of process as to foreign corporations. The statutes required that jurisdiction might be obtained over foreign corporations by service upon any agent within the state.

Sections 5343 and 5344 appeared first in the Mississippi Code of 1906. Section 5319 appeared first in the Laws of 1928. Each of these sections were brought forward in the Code of 1930 and again in the Code of 1942. It is uniformly held that where a statute is re-enacted, the decisions of the court construing the same are made part of the re-enacted statute. *Hoy* v. *Hoy,* 48 So. 903, 93 Miss. 732; *White* v. *Railroad Company,* 97 Miss. 91, 55 So. 593; *Hammer* v. *Lumber Company,* 100 Miss. 349, 56 So. 466; *Mississippi Power & Light* v. *Garner,* 176 So. 280, 179 Miss. 588.

It is very true as pointed out by counsel in their brief in subsequent cases the Supreme Court of Mississippi has referred to the statute as rendering a contract unenforceable.

Counsel cite the case of *Long Beach Canning Company* v. *Clark,* 141, Miss. 177, 106 So. 646. In that case the court held that the mere fact that a foreign corporation has not qualified under the laws of the State of Mississippi did not prevent it from disposing of a single piece of property which it had acquired previously. The court held that the mere sale of a specific piece of property was not transacting business within the state.

The case of *Citizens Bank of Hattiesburg* v. *Grigsby,* 155 So. 684, 170 Miss. 655, merely held that a contract of a

reign corporation failing to comply with the state statutes d not void a conveyance of the property to a third person. he syllabi contains the following language at page 656:

"Contract for purchase of property sold on foreclosure under deed of trust which had been executed to foreign corporation not having filed its charter within state held not void as to third persons purchasing property (Code 1930, section 4164)."

However, in the most recent case upon the subject, *Newell onstruction Company* v. *State Highway Commission*, 15 o. (2d) 700, 195 Miss. 395, addressing itself to the effect n the enforceability of a contract entered into in the State f Mississippi by a foreign corporation without qualifying, ie court used the following language:

". . . we are of the opinion that the defendant, State Highway Commission, had the right to assume, without making any investigation in that behalf, that the complainant, as such a foreign corporation, had complied with the plain mandates of the law in these particulars, and that therefore the trial court was not in error in permitting the amendment so as to allow the defense to be made so as to show that the contract sued on was wholly void and unenforceable, and this is especially true in the absence of a showing that the defendant had notice of the non-compliance with the statutes prior to the taking of the evidence by the complainant in support of the allegations of its bill of complaint . . ."

In the foregoing case, the Supreme Court of Mississippi ot only said that the contract was wholly null and void s to the foreign corporation but contained a very clear ntimation that a like result would follow as to the defendnt if it had knowledge of such failure; that is to say, in uch event the contract would be void as to both of the arties.

The Supreme Court of Mississippi has definitely settled in very recent cases that a contract made in violation of a statute is void and unenforceable although the statute does not so provide in express terms. In the case of *Grapico Bottle Company* v. *Ennis*, 140 Miss. 502, 106 So. 97, the court held that contracts made in violation of the Sunday laws were void and that neither party could recover thereupon when they were *in pari delicto*.

In the case of *Miller* v. *Lynch*, 38 Miss. 344, it was held that a promissory note executed on Sunday was void.

In the case of *Jones* v. *Brantley*, 121 Miss. 721, 83 So. 802, it was held that an attorney could not recover for legal services rendered upon the Sabbath day.

In the case of *Aldrich* v. *Rice*, 161 Miss. 879, 138 So. 570, the Mississippi Code prohibited the taking of a promissory note in payment of a subscription to capital stock of the corporation. The court held that since the taking of the note was expressly forbidden by statute, the consideration was illegal and conferred no right upon the holder of the note.

In the case of *Mitchell* v. *Campbell*, 111 Miss. 806, 72 So. 31, it was held that where a landlord leases his property for immoral purposes that a note given therefor was not enforceable but was void even in the hands of an innocent purchaser for value.

The following decisions from this Court are directly in point:

It is unlawful to contract to do that which it is unlawful to do. *Bank of U. S.* v. *Owens*, 27 U. S. 527, 7 L. Ed. 508.

A contract to do an act forbidden by law cannot be enforced in a court of justice. *Tiffany* v. *Boatman's Sav. Inst.*, 85 U. S. 375, 21 L. Ed. 868.

An action cannot be maintained on a contract, the making of which is prohibited by statute. *Armstrong* v *Toler*, 24 U. S. 258, 6 L. Ed. 468.

In the case of *Walworth* v. *Kneeland*, 56 U. S. 348, 14 L. Ed. 724, it is held that a contract forbidden by an act of Congress is void and may not be enforced.

In the case of *Bank of U. S.* v. *Owens*, 27 U. S. 527, 7 L. Ed. 508, it is held that where a statute imposes a penalty for an act, a contract based thereon is illegal, though the statute does not expressly so declare.

A contract forbidden by law may not be enforced. *United States of America* v. *City and County of San Francisco*, 310 U. S. 16, 84 L. Ed. 1050.

Again, however, we place emphasis on the view which we have presented to the Court in our original brief that the question doesn't turn on whether the contract is totally void or merely unenforceable. Under the Judiciary Act of 1789, brought forward in Section 725, Title 28, U. S. C. A., the statutes of the state are made binding upon the federal court. Therefore, the determinative question is as to whether or not recovery could be had by the respondent upon the contract sued upon in the state court. If the contract sued upon was made in violation of law, was prohibited by the statutes of the State of Mississippi under the circumstances made, recovery would be denied to the respondent not only in the state court but in the federal court.

Respondent's counsel cite the case of *Bradford* v. *Indiana Harbor Belt Railroad Company* (C. C. A. 7), 16 Fed. (2d) 836; *Industrial Finance Corporation* v. *Community Finance Company*, (C. C. A. 5), 294 Fed. 870; *Brace* v. *Gauger-Kor[illegible]o Construction Company* (1929, C. C. A. 8), 36 F. (2d) 661. These cases merely announce the rule stated in the *Lupton* case and if the rule therein announced be

obsolete under the case of *Angel* v. *Bullington*, the decisions likewise are no longer authorities.

III

Respondent's suit is not for the recovery of a penalty but on alleged breach of contract of which the United States District Court had jurisdiction. The plaintiff, however, had no cause of action.

Respondent's counsel present the view that the Court will not enforce a penalty and seek to draw the rule therefrom that a defendant may not plead in bar of an action the illegality of the contract sued upon as being prohibited by statute. There is a rule prevailing in the federal courts as well as state courts that neither the federal court nor the state court will enforce at the instance of the plaintiff a penal action. The rule is very well illustrated insofar as the state court is concerned by the cases of *Brown* v. *Kildare* (Washington), 108 Pac. 452; *People* v. *Crucible Steel Company*, 151 Mich. 718, 115 N. W. 705.

A typical case in the federal court is *Wisconsin* v. *Pelican Insurance Company*, 127 U. S. 265, 32 L. Ed. 239. In that case the State of Wisconsin recovered a judgment against the Pelican Insurance Company of Louisiana in a state court for pecuniary penalties for failure to discharge certain obligations to the State of Wisconsin. Being unable to realize on the judgment, the State of Wisconsin filed an original action before this Court seeking to enforce its judgment. The Court declined to do so holding that the action was one for the recovery of penalties. The Court held that the judgment rendered in the State of Wisconsin was not entitled to receive full faith and credit under the Constitution of the United States. This case, however, has been subjected to criticism and modification.

The case of *Milwaukee County* v. *M. E. White Company*, 296 U. S. 268, 80 L. Ed. 220, was a suit brought not originally

in this Court but in the United States District Court of the State of Illinois to recover on a judgment rendered by a Wisconsin court for taxes due the State of Wisconsin. Mr. Justice Stone, in delivering the opinion of the court in holding that the case was not for the recovery of a penalty and therefore not one which the Court could not take jurisdiction of, used the following language:

> "By Sec. 24 of the Judicial Code, U. S. C. A., title 28, Sec. 41, district courts are given original jurisdiction 'of all suits of a civil nature at common law or in equity', where there is the requisite diversity of citizenship and the amount of controversy exceeds $3,000. In this grant of jurisdiction of causes arising under state as well as federal law the phrase 'suits of a civil nature' is used in contradistinction to 'crimes and offenses,' as to which the jurisdiction of the district courts is restricted by Sec. 24 (2) to offenses against the United States. Thus suits of a civil nature within the meaning of the section are those which do not involve criminal prosecution or punishment, and which are of a character traditionally cognizable by courts of common law or of equity."

Mr. Justice Stone in the opinion in that case called attention to the distinction which must be observed in this case; that is to say, the difference between a want of jurisdiction in the court where the suit is filed and the lack of merits in the plaintiff's case. Addressing himself to that question, Mr. Justice Stone used the following language:

> "The objection that the courts in one state will not entertain a suit to recover taxes due to another or upon a judgment for such taxes is not rightly addressed to any want of judicial power in courts which are authorized to entertain civil suits at law. It goes not to the jurisdiction but to the merits, and raises a question which district courts are competent to decide. See Illinois C. R. Co. v. Adams, 180 U. S. 28, 45 L. Ed.

410, 21 S. Ct. 251; General Invest. Co. v. New York C. R. Co. 271 U. S. 228, 230, 70 L. Ed. 920, 921, 46 S. Ct. 496; Becker Steel Co. v. Cummings, decided November 11, 1935 (296 U. S. 74, ante, 54, 56 S. Ct. 15)."

In the case of *General Investment Company* v. *New York Central Railroad Company*, 271 U. S. 228, 70 L. Ed. 920, this Court, speaking through Mr. Justice Van Devanter, used the following language:

> "There may be jurisdiction and yet an absence of merits (The Fair *v.* Kohler Die & Specialty Co., 228 U. S. 22, 25, 56 L. ed. 716, 717, 33 Sup. Ct. Rep. 410; Geneva Furniture Mfg. Co. *v.* S. Karpen & Bros., 238 U. S. 254, 258, 59 L. ed. 1295, 1297, 35 Sup. Ct. Rep. 788)."

A very interesting case is that of *Fauntleroy* v. *Lum*, 210 U. S. 230, 52 L. Ed. 1039. In that case the appellant entered into contracts in the State of Mississippi gambling in cotton futures. The contract was unenforceable in the State of Mississippi. However, the respondent was able to obtain service of process on the appellant in the State of Missouri and recovered judgment therein. The suit was brought upon the judgment in the State of Mississippi and the appellant, Fauntleroy, made the defense that the cause of action was void under the Mississippi law and that suit could not be maintained in the state court. Mr. Justice Holmes used the following language:

> "The main argument urged by the defendant to sustain the judgment below is addressed to the jurisdiction of the Mississippi courts.
>
> "The laws of Mississippi make dealing in futures a misdemeanor, and provide that contracts of that sort, made without intent to deliver the commodity or to pay the price, 'shall not be enforced by any court.' Annotated Code of 1892, Sec. 1120, 1121, 2117. The defendant contends that this language deprives the Mississippi courts of jurisdiction, and that the case is like

Anglo-American Provision Co. *v.* Davis Provision Co., 191 U. S. 373, 48 L. ed. 225, 24 Sup. Ct. Rep. 92. There the New York statutes refused to provide a court into which a foreign corporation could come, except upon causes of action arising within the state, etc.; and it was held that the state of New York was under no constitutional obligation to give jurisdiction to its supreme court against its will. One question is whether that decision is in point.

"No doubt it sometimes may be difficult to decide whether certain words in a statute are directed to jurisdiction or to merits, but the distinction between the two is plain. One goes to the power, the other only to the duty, of the court. Under the common law it is the duty of a court of general jurisdiction not to enter a judgment upon a parol promise made without consideration; but it has power to do it, and, if it does, the judgment is unimpeachable, unless reversed. Yet a statute could be framed that would make the power, that is, the jurisdiction, of the court, dependent upon whether there was a consideration or not. Whether a given statute is intended simply to establish a rule of substantive law, and thus to define the duty of the court, or is meant to limit its power, is a question of construction and common sense. When it affects a court of general jurisdiction, and deals with a matter upon which that court must pass, we naturally are slow to read ambiguous words as meaning to leave the judgment open to dispute, or as intended to do more than to fix the rule by which the court should decide.

"The case quoted concerned a statute plainly dealing with the authority and jurisdiction of the New York court. The statute now before us seems to us only to lay down a rule of decision. The Mississippi court in which this action was brought is a court of general jurisdiction and would have to decide upon the validity of the bar, if the suit upon the award or upon the original cause of action had been brought there. The words 'shall not be enforced by any court' are simply another, possibly less emphatic, way of saying that an action

> shall not be brought to enforce such contracts. As suggested by the counsel for the plaintiff in error, no one would say that the words of the Mississippi statute of frauds, 'An action shall not be brought whereby to charge a defendant,' Code 1892, Sec. 4225, go to the jurisdiction of the court. Of course it could be argued that logically they had that scope, but common sense would revolt."

The statement of Judge Holmes in the foregoing opinion in reference to the Mississippi statute of frauds is a most relevant illustration. Section 264, Mississippi 1942 Code, provides that no suit shall be brought to charge a defendant or other party (a) upon any promise to answer for the debt of another (b) upon any agreement made upon consideration of marriage, etc. A copy of the statute is made *Appendix 1* hereto.

As well pointed out by Judge Holmes, the statute does not affect the jurisdiction of the court. It relates to the liability of the party sought to be held responsible.

In the case of *Wabash R. Co.* v. *Duncan* (8th Cir.) 170 Fed. (2d) 38, the following language is used at Page 41:

> "'Jurisdiction is the right to put the wheels of justice in motion and to proceed to the final determination of a cause upon the pleadings and evidence. . . . It may undoubtedly be shown in defense that plaintiff has no right under the allegations of his bill or the facts of the case to bring suit, but that is no defect of jurisdiction, but of title.' Illinois Central Railroad Co. *v.* Adams, 180 U. S. 28, 34, 21 S. Ct. 251, 253, 45 L. Ed. 410. See also Walling *v.* Miller, 8 Cir., 138 F. 2d 629, 631, and cases cited."

In the case of *Walling, Administrator*, v. *Miller*, 8th Circuit, 138 Fed. (2d) 629, addressing itself to the identical question as to the difference between jurisdiction and merits, the court used the following language:

> "On the distinction between a question of jurisdiction and a question of merits in such a case, the Court said:

'By jurisdiction we mean power to entertain the suit, consider the merits and render a binding decision thereon; and by merits we mean the various elements which enter into or qualify the plaintiff's right to the relief sought. There may be jurisdiction and yet an absence of merits (citations) as where the plaintiff seeks preventive relief against a threatened violation of law of which he has no right to complain, either because it will not injure him or because the right to invoke such relief is lodged exclusively in an agency charged with the duty of representing the public in the matter. Whether a plaintiff seeking such relief has the requisite standing is a question going to the merits, and its determination is an exercise of jurisdiction. (Citations.). If it be resolved against him, the appropriate decree is a dismissal for want of merits, not for want of jurisdiction.' (271 U. S. 230, 46 S. Ct. 497, 70 L. Ed. 920)

"In the Adams case the Court said that a person without a legal interest in a cause of action could not maintain a suit in his own name; 'but it never would be contended that the court would not have jurisdiction to inquire whether such disability in fact existed, nor that the case could be dismissed on motion for want of jurisdiction. The right to bring a suit is entirely distinguishable from the right to prosecute the particular bill.' (180 U. S. 28, 21 S. Ct. 253, 45 L. Ed. 410.) The decision in the Venner case is to the same effect."

The respondent in this case was not suing for a penalty. The suit is for breach of contract. The district court had no option other than to take jurisdiction of the case. The petitioner, among other defenses, pleaded that the contract was void and unenforceable under the laws of the State of Mississippi. This was not a plea to the jurisdiction of the court but was a plea in bar in defense of the action. Respondent's suit was dismissed not on any ground of jurisdiction but because the respondent had no cause of action under the laws and statutes of the State of Mississippi.

As we have stated; the respondent's cause of action is not one for a penalty but is brought to recover money alleged to be due and owing growing out of a contract. The Court had perfect jurisdiction. While it may be true that a plaintiff may not sue in the Federal Court to recover a penalty, a defendant sued may plead any available defense under the state law although the contract entered into was punishable as a crime. The fact that a plaintiff may not sue to recover a penalty in the Federal Court does not deprive a defendant of the right to avail himself of any defense available under state law.

In the case of *Uhlmann Grain Co.* v. *Dickson*, 288 U. S. 188, 77 L. Ed. 691, 83 A. L. R. 492, suit was brought in the State of Missouri in the District Court of the United States to recover by a broker for losses sustained under a contract for sale of commodities in futures. It entered into the contract in the State of Missouri, which was punishable as a crime and was void and unenforceable in any Court. The District Court of the United States took jurisdiction of the case and determined the same on the merits. The case presented no question of jurisdiction.

Since the granting of certiorari, the United States Court of Appeals, Seventh Circuit, has rendered a decision which we deem it our duty to direct to the attention of the Court, in the case of *Davidson et al.* v. *Gardner*, 172 Fed. (2d) 188. In that case suit was brought in the Federal Court of the United States for the Northern District of Illinois to recover for damages for a death occasioned by the negligence of railroad employees in the State of Missouri under the Federal Employers' Liability Act. In the State of Illinois there was in force the following statute:

> "Sec. 2, Chap. 70 of the Illinois Injuries Act provides: 'That no action shall be brought or prosecuted in this State to recover damages for a death occurring

outside of this State where a right of action for such death exists under the laws of the place where such death occurred and service of process in such suit may be had upon the defendant in such place.' "

The appellee defendant presented the view to the Court in defense of the action that no such suit could be maintained in the State Court and, therefore, the action would not lie in the Federal Court. The Court of Appeals correctly held that the statute in question dealt not with the question of liability but with the jurisdiction of the Court and that the Federal Court in Illinois could not be deprived of jurisdiction by an Illinois statute. The Court, in our judgment, reached the correct conclusion. The case of *Angel* v. *Bullington* was not applicable thereto. The statute of Illinois was intended to affect the jurisdiction of the Court and not the question of liability. Such liability as there was, if any, arose under an act of Congress and the United States District Court of Illinois had no choice except to take jurisdiction of and proceed with the case.

Mr. Justice Holmes, in the case of *Fauntleroy* v. *Lum*, 210 U. S. 230, 52 L. Ed. 1039, called attention to the difficulty sometimes in determining the question as to whether or not a state statute affected the jurisdiction of the Court or dealt with the merits of the controversy, referring to the case of *Anglo-American Provision Co.* v. *Davis Provision Co.*, 191 U. S. 373, 48 L. Ed. 225. There a New York statute prohibited the maintenance in a State Court of an action on a judgment by one foreign corporation against another foreign corporation. In view of the fact that the statute dealt with the jurisdiction only of Courts and not with the merits of the controversy the statute was held valid.

With this distinction in mind, turning to the Illinois statute, reviewed by the Court of Appeals, Seventh Circuit, on its face the statute was intended to deal, not with the merits

of the controversy, but with the jurisdiction of State Courts of Illinois. Therefore, the rule announced in *Angel* v. *Bullington* was not applicable. The Illinois statute did not deal with the merits; it dealt only with the jurisdiction of the State Courts in Illinois.

Coming to the Mississippi statutes under consideration, as Mr. Justice Holmes said in the case of *Fauntleroy* v. *Lum*, it would be repugnant to common sense to hold that the Mississippi statutes related to jurisdiction and had no reference to the merits of the controversy. It must be borne in mind in Mississippi there are three statutes. These statutes have been construed by the Supreme Court of Mississippi in some instances as rendering a contract entered into in violation of them as being totally void; in some instances as being void and unenforceable. The statutes, however, relate to the merits of the controversy. They affect the right of the plaintiff to recover and confer upon the defendant a complete defense thereto whether in the State or the Federal Court.

We respectfully submit that the judgment of the United States Court of Appeals, Fifth Circuit, should be reversed and the judgment of the District Court affirmed.

Respectfully submitted,

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APPENDIX 1

"264. Certain contracts to be in writing.—An action shall not be brought whereby to charge a defendant or other party:

(a) Upon any special promise to answer for the debt or default or miscarriage of another person;

(b) Upon any agreement made upon consideration of marriage, mutual promises to marry excepted;

(c) Upon any contract for the sale of lands, tenements, or hereditaments, or the making of any lease thereof for a longer term than one year;

(d) Upon any agreement which is not to be performed within the space of fifteen months from the making thereof; or

(e) Upon any special promise by an executor or administrator to answer any debt or damage out of his own estate;

Unless, in each of said cases, the promise or agreement upon which such action may be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some person by him or her thereunto lawfully authorized in writing."

No. 465

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

J. S. WOODS,
Petitioner,

vs.

INTERSTATE REALTY COMPANY,
Respondent.

BRIEF OF RESPONDENT ON APPLICATION OF PETITIONER FOR WRIT OF CERTIORARI

JOHN A. OSOINACH,
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No. 465

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

J. S. WOODS,
Petitioner,

vs.

INTERSTATE REALTY COMPANY,
Respondent.

BRIEF OF RESPONDENT ON APPLICATION OF PETITIONER FOR WRIT OF CERTIORARI

To the honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

FOREWORD

This brief is in answer to the petition filed in this cause for writ of certiorari.

Petitioner has already referred the Court to the official report of the opinion below. He has set forth the jurisdictional grounds upon which he bases his assertion of right to the writ prayed for. We have no quarrel with these if the premises upon which he predicates his petition are sound, but we say they are not.

SUMMARY OF ARGUMENT.

I.

The contract violates no statute or public policy of the State of Mississippi. The statutes relied upon by petitioner do not forbid the making or performance of contracts like the one which is the basis of this suit. They provide penalties as to foreign corporations which do not comply with certain requirements as to domestication. The public policy of the State is no broader than the intendment of the statutes and they only provide exclusion from the State courts, together with certain fines, as such penalties.

Miss. Code of 1942, Sections 5319, 5339, 5343 and 5344.

Miss. Laws of 1944, Chap. 137, Sections 155 and 224.

II.

The decisions with respect to these statutes from the Supreme Court of Mississippi are conflicting but, as the United States Court of Appeals for the Fifth Circuit has found, the Supreme Court of Mississippi does not consider contracts made by non-complying foreign corporations to be void but only unenforceable in the state courts.

Interstate Realty Co. v. Woods, C.C.A. 5, 168 F. (2d) 701.

III.

There is nothing in the decisions of the Supreme Court of the United States which would indicate that it has decided to include cases arising under State penal statutes among those falling under the doctrine of Erie v. Tompkins. As to such cases, it cannot be said that the Federal district courts must give effect to such State penal stat-

utes the same as the State courts of the same jurisdiction would be required to do.

Guaranty Trust Co. v. York, 326 U.S. 99, 89 L. Ed. 2079, 160 A.L.R. 1231.
Angel v. Bullington, 330 U.S. 183, 91 L. Ed. 832.

IV.

Petitioner is confusing two familiar principles of law. One is that a contract whose subject matter is in violation of the law or public policy of a state is void and will not be enforced in any court. The other is that under certain penal statutes of the states, the contracts of parties who have failed to comply with certain statutory requirements set up by the State will not be enforced in the courts of the State when the statutes so direct. This contract falls within the second category, and its non-enforceability extends only to the courts of Mississippi. In the latter situation, the public policy of the State only requires that such plaintiffs be excluded from the State courts.

12 Amer. Juris. 668, Sec. 171, note 7.
C. B. & Q. Ry. Co. v. Maguire, 219 U.S. 549, 55 L. Ed. 328, 31 S. Ct. 259.
Compare May v. Mulligan, 36 F. Supp. 596, aff. 117 F. (2d) 259, Cert. Den. 312 U.S. 691, 85 L. Ed. 1127.

V.

The enactment of Section 5319 of the Mississippi Code of 1942, coming fourteen years after the decision in Quartette Music Company v. Haygood, 108 Miss. 755, 67 So. 211, clearly shows that the legislature of the State of Mississippi did not intend that either the law or the public policy of the State of Mississippi should make contracts of non-complying foreign corporations void, but

only that they should be unenforceable in the courts of Mississippi.

Quartette Music Company v. Haygood, supra.
Miss. Code of 1942, Section 5319.
C. B. & Q. Ry. Co. v. Maguire, supra.

VI.

Counsel for petitioner have assumed, rather than established, the position that the contract in suit is against the laws and public policy of Mississippi. Since their assumption is wrong, the entire premise upon which their position is predicated falls.

VII.

The case is one in which certiorari should not be granted.

ARGUMENT.

I.

The Contract Violates No Statute or Public Policy.

Petitioner seems to base his application for certiorari chiefly upon the contention that the Federal District Court could not entertain respondent's suit because it arises out of a contract which violates the statutes and public policy of the State. (Petitioner's Reason I.) If petitioner be wrong as to this basic premise, it seems obvious that he is not entitled to the writ. It is our position that the contract itself violates no statute of the State of Mississippi. It is our further position that the contract does not violate the public policy of the State of Mississippi because the public policy of the State, as reflected in its statutes, extends no further than the fair intendment of the statutes themselves. Such violation of

the laws of Mississippi as may exist here has nothing to do with the contract itself but only with the failure of respondent to qualify as a foreign corporation before making the contract. The statutes involved in this matter are penal in their nature. They provide that under these circumstances such a foreign corporation "shall not be permitted to bring or maintain any action or suit in any of the courts of this State". (Section 5319, Mississippi Code of 1942). The restrictions of this language of the statute itself must be deemed to be incorporated into the public policy of the State. Additional penalties are provided in the form of fines, further corroborating our contention that the statutes in question are essentially penal in their nature.

II.

Section 5344, Miss. Code of 1942, Analyzed.

When analyzed, Section 5344, Mississippi Code of 1942 falls within the purview of the observations made above. That is to say, that Section provides that foreign corporations "shall not be allowed to recover on any contract made in violation of law or public policy". The contract here was not one in violation of any law or of the public policy of the State of Mississippi. There is nothing violative of the laws or public policy of Mississippi about a contract to sell real estate for another. Moreover, this section seems clearly intended to apply to foreign corporations which have qualified and is only intended to provide that after qualifying they, like domestic corporations, must observe the laws and public policy of the State of Mississippi. It does not deal with the admission of foreign corporations and obviously does not contemplate failure to qualify as being any part of a "contract made in violation of law or public policy".

III.

The Statute As To License Fees Upon Real Estate Agents.

The same observations as we have made under Section I above are applicable to Section 155, Chapter 137, Mississippi Laws of 1944. This provides for certain license fees upon real estate agents and brokers. The only penalty provided for the violation of this act consists of a fine or imprisonment or both. (Section 224, Chapter 137, Mississippi Laws of 1944).

IV.

These Penalties Are Limited to Those Specifically Set Forth in the Mississippi Statutes.

Since the public policy of Mississippi extends no further than the fair intendment of these statutes and since they provide for exclusion of such foreign corporations from the State courts and, in addition, certain fines as the only penalties for non-compliance, the conclusion seems clear that the public policy of the State is satisfied when these penalties are inflicted upon violators and that the public policy of the State does not contemplate any more drastic penalization than that provided by the statutes themselves. That is to say, exclusion from the State courts is the maximum—and only—penalty of the kind provided or intended. Any other interpretation, such as extending the barrier to suing so as to include suits in the Federal courts, would result in inflicting additional penalties upon violators which were not contemplated or provided by the Legislature of Mississippi.

> "Where the law-making power speaks on a particular subject over which it has constitutional power

to legislate, public policy in such a case *is what the statute enacts.*" (Italics ours.)

12 Amer. Juris. 668, Sec. 171, note 7.

C. B. & Q. Ry. Co. v. Maguire, 219 U.S. 549, 55 L. Ed. 328, 31 S. Ct. 259.

V.

The Supreme Court of Mississippi Does Not Say That Such Contracts Are Void.

The most that can be said on petitioner's behalf with respect to the adjudicated cases in Mississippi is that they are in confusion. On behalf of the respondent, we think it can fairly be added that out of the confusion there emerges sufficient light to indicate that the highest court in the State does not consider such contracts to be void but only unenforceable in the State courts.

VI.

Discussion of Non-Applicability of Guaranty Trust Co. v. York and Angel v. Bullington.

Petitioner gives as his second reason why the writ of certiorari should be granted, that the Court of Appeals for the Fifth Circuit has decided an important question of a local nature in a way which is in conflict with applicable local decisions. This seems to us merely a re-statement of petitioner's Reason I, except that it deals with local decisions instead of statutes, and also that it further discusses the view which this Court has taken of the applicability of State laws and decisions in other cases, which are, we think, of dissimilar types.

Both Reason I and Reason II advanced by petitioner invoke certain recent decisions of this court, particularly Guaranty Trust Company v. York, 326 U. S. 99, 89 L.

Ed. 2079, 160 A.L.R. 1231, and Angel v. Bullington, 330 U. S. 183, 91 L. Ed. 832. Both cases apply the doctrine of Erie v. Tompkins, and it appears to be upon certain observations of this Court in those cases that petitioner most strongly relies. Neither case deals with statutes, public policy or situations comparable to those found here. Significantly, in Angel v. Bullington, supra, this Court's statement was that Erie v. Tompkins "drastically *limited* the power of Federal district courts to entertain suits in diversity cases that could not be brought in the respective State courts or were barred by defenses controlling in the State courts". (Italics ours). It will be noted that the Court did not say that Erie v. Tompkins *abolished* the power of Federal district courts to entertain suits in all such diversity cases.

This court apparently did not intend by its decision in Angel v. Bullington to close the doors of the Federal district courts to every conceivable suit in a diversity case that could not be brought in the State courts. It has ruled that the doctrine of Erie v. Tompkins should be applied where suits involve questions concerning burden of proof, conflict of laws and contributory negligence. (Guaranty Trust Company v. York, supra).

We do not believe that this Court by that decision intended to add cases arising under state penal statutes to the list of those falling under the doctrine of Erie v. Tompkins; and that, it seems to us, is what it would have to do in order to decide this case favorably to the contentions of petitioner. It might be added that if the Federal courts are going to enforce one phase of the penal statutes of the State of Mississippi, there is no reason why they should not enforce other phases of the same

statutes. However, it seems to us that that is the ultimate question with which the Court may be confronted in considering the petition for certiorari in this case.

VII.

Contracts Like the One in Suit Are Not Void Nor Against Public Policy in Mississippi.

We repeat that the contract in the case at bar is not in violation of the statutes and public policy of Mississippi. If the contract had been performed and the commission paid, petitioner could not have recovered this commission in any court. No statute of Mississippi says the making or performance of a contract like this is void.

All of these statutes must be read together. They are all part of one chapter of the Mississippi Code of 1942 and they all deal with foreign corporations doing business in Mississippi. Section 5319 merely says that respondent cannot bring or maintain any suit on this contract in the State courts of Mississippi. Section 5339 provides merely for the domestication of foreign corporations and for nothing else. Section 5343 simply provides for the filing with the Secretary of State by a foreign corporation of its charter or certificate of incorporation, and provides a fine of $100 for failure to do so. Section 5344 says that a foreign corporation shall not be allowed to recover on any contract made in violation of the laws or public policy in Mississippi, but it does not say anything about the making or performance of a contract like this being in violation of the laws or public policy of the State. Of course, a foreign corporation could not make a valid Sunday contract or a valid contract to sell whiskey in Mississippi.

Furthermore, when Quartette Music Co. v. Haygood, (1914) 108 Miss. 755, 67 So. 211, said that contracts such as this were void, what is now Section 5319 had not been enacted. What is now Section 5339 is identical with Code of 1906, Section 915, which Section was in effect at the time of that decision. What is now Section 5343 is identical with Code of 1906, Section 935, which Section was also in effect at the time of that decision. What is now Section 5344 is identical with Code of 1906, Section 914, which Section was likewise in effect at the time of that decision.

So if the legislature of Mississippi had wanted the making or performance of such contracts to be void, or if it had considered the making or performance of such contracts against the laws or public policy of Mississippi, then the legislature had only to say so. Actually the legislature had only to let the decision in Quartette Music Co. v. Haygood, supra, alone, and such contracts would have been held to be void. But the legislature did not do this. In 1928, fourteen years after the decision in Quartette Music Company v. Haygood, the legislature enacted Section 5319 of the Code of 1942, which Section specifically says only that such a corporation can not bring or maintain any suit on such a contract in the courts of the state.

As this Court said in C. B. & Q. Ry. Co. v. Maguire, supra, "The legislature, provided it acts within its constitutional authority, is the arbiter of the public policy of the State. While the court, unaided by legislative declaration and applying the principles of the common law, may uphold or condemn contracts in the light of what is conceived to be public policy, its determination as a rule

for future action must yield to the legislative will when expressed in accordance with the organic law . . . "

In May v. Mulligan, 36 F. Supp. 596, affirmed 117 F. (2d) 259, cert. dem. 312 U. S. 691, 85 L. Ed. 1127, we find a good illustration of the kind of statute under which a contract is held to be void as being against public policy. There, a statute of Michigan provided that contracts not to engage in any trade, profession or business "are hereby declared to be against public policy and illegal and void." Only a brief comparison is necessary to show the vast difference between the statute there and in the case at bar.

Therefore, we submit that the assumption by counsel that the making and performance of a contract like this is against the laws and public policy of Mississippi is merely an assumption and has no basis in fact or law. The statutes of Mississippi do not make void or against public policy the making or performance of such contracts. They only make the bringing or maintaining of a suit on such contract unenforceable in the State courts. In effect, petitioner is asking the Supreme Court of the United States to do something which the legislature of Mississippi obviously did not want to do.

VIII.

Additional Cases Showing That the Supreme Court of Mississippi Does Not Consider Such Contracts Void.

As pointed out in the opinion of the Court of Appeals for the Fifth Circuit, (1948), 168 F. (2d) 701, the Supreme Court of Mississippi has itself indicated that such con-

tracts are not void, but that what is forbidden by the Mississippi statutes is only the bringing or maintenance of a suit upon such contracts in the State courts.

This is made clear by the case of *Long Beech Canning Co. v. Clark*, (1925), 141 *Miss.* 177, 106 *So.* 646. At page 186 of 141 Miss., the Supreme Court of Mississippi said:

> "The statute does not make a forfeiture of property to the state for failure to record its charter. It simply refuses the aid of its courts to those doing business in violation of the law without recording their charter."

Further, in Citizens' Bank of Hattiesburg v. Grigsby, (1934) 170 Miss. 655, 155 So. 684, the Supreme Court of Mississippi said, at page 685 of 155 Southern:

> "It is next contended that the contract was void, and that no validity can be given to the deed under the foreclosure. It will be noted, in considering this contention, that the Franklin Bond and Mortgage Co. is not a party to the suit, is seeking no relief in Court, and has sought none. The statute bearing on the matter denies to a corporation violating the statute, access to the courts for any relief. We do not think the statute voids the contract so as to affect third persons, and we are of the opinion that nobody can raise this question but the state of Mississippi when suit is brought by third persons, or when the litigation is between other persons than the corporation violating the statute and the state of Mississippi."

If a contract is void because it violates the public policy of the state, it is void for all purposes. The above case shows that the Supreme Court of Mississippi does not consider such a contract to be void.

IX.

Further Analysis of State and Federal Decisions.

The decisions of the Supreme Court of Mississippi are conflicting. Adversary counsel say "there is some confusion in the decisions of the Supreme Court of Mississippi as to whether such a contract is absolutely null and void, or merely unenforceable." (Page 11 of Brief for Petitioner). This is a mild understatement but we are pleased that counsel for petitioner have been driven to this admission. In their first brief before the Court of Appeals, they took the position that the decisions of the Supreme Court of Mississippi had held beyond doubt that such contracts were null and void. Now they admit that the decisions of the Supreme Court of Mississippi are in some confusion.

Therefore, these decisions cannot be used to show that such contracts are against the public policy of Mississippi. They can only be used to show at most, that it is against the public policy of Mississippi for such contracts to be enforced in the state courts. The Supreme Court of Mississippi, since the enactment of Section 5319 of the Mississippi Code of 1942, has never had to decide whether or not such contracts are void. Once it is shown that the foreign corporation making the contract is doing business in Mississippi and has not qualified properly under the applicable statutes, the result becomes automatic. No matter how valid or how just such a contract might be, under Section 5319 of the Mississippi Code of 1942, it can not be enforced in the courts of the State. This is all the Supreme Court of Mississippi has had to decide in such cases since 1928, and all it has decided. Anything else would have been dicta.

In Erie v. Tompkins, (1938) 304 U. S. 64, 82 L Ed. 1188, 114 A.L.R. 1487, a decision in favor of Tompkins would have permitted him to do something that a resident citizen of Pennsylvania could not have done. Permitting respondent to maintain this suit in the Federal Court will not discriminate against any resident citizen or any domestic corporation of Mississippi.

There are other reasons, too, why the decision in Angel v. Bullington, (1947), 330 U. S. 183, 91 L Ed. 832, does not apply to the case at bar. For one thing, the decision was on the ground of res judicata. For another thing, as we said in our brief in reply to the petition for rehearing in the Court of Appeals, the North Carolina statute involved in Angel v. Bullington is entirely different from the Mississippi statutes involved here. The North Carolina statute said that neither Bullington nor anybody else could recover a deficiency judgment in any court. The Mississippi statutes simply say that a non-complying foreign corporation cannot sue in the State courts. Again, if the Supreme Court of the United States had decided for Bullington, it would have discriminated in his favor against resident citizens of North Carolina. A resident citizen or a domestic corporation could not have recovered a similar deficiency judgment in the State courts. On the other hand, a contract like that in the case at bar can be enforced in the State courts by a resident citizen or a domestic corporation.

Under Brace v. Gauger-Korsmo Construction Company, (1929, C.C.A. 8th), 36 F. 2d 661, (Certiorari denied 1930), 281 U. S. 738, 50 Sup. Ct. 333, 74 L. Ed. 1153, the Court pointed out that the Arkansas decisions construing

the statute involved were in conflict, as is true here, and therefore, held that it was entitled to adopt its own construction, saying:

> "*The statute is penal in character, and hence must be strictly construed* . . . In our opinion the statute cannot be invoked, because it does not make the contract void . . . " (Italics ours.)

There is nothing in the opinion in Angel v. Bullington that says that Brace v. Gauger-Korsmo Construction Company, supra, is overruled or obsolete.

X.

Further Analysis of Other State Decisions.

The local decisions referred to by petitioner under Reason II do reflect considerable confusion. The following analysis of some of the pertinent local decisions may be of some further assistance.

Newell Contracting Co. v. State Highway Commission, (1943) 195 *Miss.* 395, 15 *So.* (2d) 700.

In this case, the Supreme Court of Mississippi, referring to a contract made by a non-qualified foreign corporation, did say that "the contract is void and unenforceable". Now a contract may be unenforceable and not be void at all. In this very case, the Supreme Court of Mississippi allowed a recovery on a contract supplemental to the main contract, because before making the supplemental contract the foreign corporation had qualified properly under the statutes. This would clearly indicate that contracts made by non-qualified foreign corporations are not considered void by the Supreme Court of Mississippi. They are merely unenforceable in the State courts. If the main contract was void, the supple-

mental contract could not have been held valid because it was based on the main contract.

Quartette Music Co. v. Haygood, (1914), 108 *Miss.* 755, 67 *So.* 211.

We first felt that the above case did not hold such contracts as the one involved here to be void. We think that we were mistaken in this and that the decision in Quartette Music Company v. Haygood supra, did hold the contract there to be void. That case was decided in 1914. In 1928, fourteen years later, the legislature of Mississippi enacted what is now Section 5319 of the Mississippi Code of 1942. That section contains as its last sentence these words: "Any foreign corporation failing to comply with the above provisions shall not be permitted to bring or maintain any action or suit in any of the courts of this state."

Now if the Legislature of Mississippi intended contracts made in Mississippi by non-qualified foreign corporations to be completely void, and thus unenforceable in any court of any sovereignty, all it had to do was to let the decision stand in Quartette Music Company v. Haygood, supra. Plainly, it did not so intend, but enacted the last sentence of Section 5319 of the Mississippi Code of 1942 specifically to show that such contracts were not void as against the public policy of Mississippi. Otherwise there was no reason for the enactment of the sentence above quoted.

Bohn v. Lowry, (1899), 77 *Miss.* 424, 27 *So.* 694.

It is true that this case holds what petitioner says it does but his quotation on page 13 of his brief stopped too soon. The paragraph of the opinion following immediately after his quotation says this:

"The illegality, whether arising by common law or from the statute, affects the act or contract with like infirmity. *An exception to this rule of law prevails where the penalty is imposed on the offending party merely for the purpose of revenue and not to prohibit the act done, nor avoid the contract.*" (Italics ours.)

Stamps v. Frost et al, (1935), 174 *Miss.* 325, 164 *So.* 584.

This case involved merely a replevin for produce seized under distress for rent under lease contract made on Sunday in violation of Mississippi Code of 1942, Section 2368. This statute absolutely prohibits work and business on Sunday.

Grapico Bottling Co. v. Ennis (1925) 140 *Miss.* 502, 106 *So.* 97.

This was a suit by the buyer of a bottled drink, bought on Sunday, on implied warranty against the bottling company. The same thing as was said above regarding Stamps v. Frost applies here.

Marx & Bensdorf v. First Joint Stock Land Bank, (1937), 178 *Miss.* 345, 173 *So.* 297.

All that is said in this case with reference to the question at issue is (page 298 of 173 So.): "It will be noted that the last clause of that paragraph provides that any foreign corporation failing to comply therewith is barred from bringing and maintaining any suits in the courts of this State." The reference is to Section 4140 of the Mississippi Code of 1930 which section is identical with what is now Section 5319 of the Mississippi Code of 1942. It is significant that the Supreme Court of Mississippi does not say that such contracts are void and does not say that the Mississippi statutes close the doors of all

courts to foreign corporations attempting to enforce such contracts.

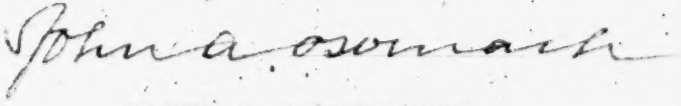
Case v. Mills Novelty Co., (1940) 187 *Miss.* 673, 193 *So.* 625.

In this case the only reference to the question here under discussion is a statement by the Supreme Court of Mississippi to this effect: " . . . and this service agreement . . . violates Section 4164, Code of 1930 (identical with what is now Section 5343 of the Mississippi Code of 1942) and is *unenforceable.*" (Italics ours). The words "void" or "voidable" are not even used.

CONCLUSION.

In conclusion, we submit that the application for certiorari should be denied.

Respectfully submitted,



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CERTIFICATE.

I certify that I have this day served notice of the filing of the above reply brief on behalf of respondent, together with copies of the brief, upon William H. Watkins, Esq., of Jackson, Mississippi, of counsel for the petitioner herein, by mailing the same to him at his office, postage prepaid, in Jackson, Mississippi.

Dated at Memphis, Tennessee, this 20th day of January, 1949.

Thomas Osmach

Of Counsel for Interstate Realty Company, Respondent

No. 463

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

J. S. WOODS,
Petitioner

vs.

INTERSTATE REALTY COMPANY,
Respondent.

BRIEF OF RESPONDENT

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No. 465

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

J. S. WOODS,
Petitioner,

vs.

INTERSTATE REALTY COMPANY,
Respondent.

BRIEF OF RESPONDENT

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

PRELIMINARY STATEMENT

The question at issue in this case is whether or not an unqualified foreign corporation which cannot maintain a suit on a contract in the courts of the State of Mississippi may still maintain such suit in the courts of the United States.

STATEMENT OF FACTS

Respondent was the complainant in the District Court. It alleged, among other things, that Petitioner, who was the defendant there, was indebted to it for a real estate

commission in the sum of $3,450.00, with interest, growing out of the sale of certain lands belonging to Petitioner. It further alleged that Petitioner had employed Respondent as its agent for the purpose of making said sale, that Respondent was the procuring cause of the sale, having developed a purchaser for the property through its efforts, but that when the contract of sale was submitted to Petitioner he declined to enter into the deal. Nevertheless, seven days after the expiration of Respondent's agency contract, Petitioner entered into a contract with the same purchaser for the property at the same price except that one-half of the commission was deducted from the revised price.

Upon the filing of the suit, defense was made on the ground that Respondent was a foreign corporation, that it had not qualified to do business in Mississippi, and that the matters involved in the suit constituted the doing of intra-state business, and defendant asked that the suit be dismissed, raising the issues which are in controversy in the present phase of the proceeding.

Dismissal of Respondent's suit and the subsequent course of events through the District Court and the Circuit Court of Appeals are adequately set forth in Petitioner's brief.

RESPONDENT'S CONTENTIONS

The contentions of the Respondent are:

1. That the contract involved in this case is not void but merely unenforceable in the state courts of Mississippi.

2. That the doctrine set out in the cases of *Angel v. Bullington*, (1947), 330 *U. S.* 183, 91 *L. ed.* 832, *and Guar-*

anty Trust Co. v. York, (1945), 326 *U. S.* 99, 65 *Sup. Ct.* 1464, 89 *L. ed.* 2079, 160 *A. L. R.* 1231, does not apply to the case at bar.

3. Even if the statutes involved in this case are held to establish the public policy of the State of Mississippi and that policy is as broad as petitioner contends, nevertheless such statutes are penal statutes and will not be enforced by the courts of another sovereignty.

ARGUMENT

I

The contention of Respondent is that the contract involved in this case is not void but merely unenforceable in the state courts of Mississippi.

The case for Petitioner is based upon the theory that to enforce a contract such as the one involved in the case at bar would be contrary to the public policy of the State of Mississippi as reflected in its statutes and in the decisions of its Supreme Court. This is the very basis of the argument of Petitioner. Therefore if such basis is not true then his whole argument fails.

The statutes involved are as set out in the brief for Petitioner and are there correctly set out.

None of these statutes make void the making or performance of a contract such as the one involved here.

Therefore we must turn to the decisions of the Supreme Court of Mississippi. What is now Section 5339 of the Mississippi Code of 1942 is identical with Section 915 of the Code of 1906. This section provides merely for

the domestication of foreign corporations and for nothing else.

What is now Section 5343 of the Mississippi Code of 1942 is identical with section 935 of the Code of 1906. This section provides for filing with the Secretary of State by such foreign corporation of its charter or certificate of incorporation and provides a fine of $100 for failure to do so.

What is now Section 5344 of the Mississippi Code of 1942 is identical with Section 914 of the Code of 1906. This section provides for suits by and against foreign corporations and concludes with the phrase: "But such foreign corporations shall not do or commit any act in this state contrary to the laws or policy thereof, and shall not be allowed to recover on any contract made in violation of law or public policy."

What is now Section 5319 of the Mississippi Code of 1942 was chapter 90 of Laws of 1928. All of these statutes are in the Code chapter on corporations and all must be read together. In reality, the only two statutes applicable here are Section 5319 and Section 5344.

In 1914 the Supreme Court of Mississippi decided the case of *Quartette Music Company v. Haygood*, (1914), 108 *Miss.* 755, 67 *So.* 211.

We were at first under the impression that this case did not hold void such contracts as the contract involved here. We are now of the opinion that we were mistaken as to this, and that the decision in the case last cited did hold void the contract involved in that suit and that, if the doctrine of the case last cited now applied, the con-

tract involved in this case would be void and could not be enforced in any court. This is because we think the case of Quartette Music Co. v. Haygood supra, stated what was conceived by the Supreme Court of Mississippi to be the public policy of Mississippi *at that time*.

At the time of this decision it must be borne in mind that sections identical with Sections 5339, 5343, and 5344 were in effect but that what is now Section 5319 of the Mississippi Code was not in effect. No statute like it was then in effect.

In 1928, fourteen years after the decision in Quartette Music Co. v. Haygood, supra, the legislature of Mississippi enacted what is now Section 5319 of the Mississippi Code of 1942. That section contains as its last sentence these words: "Any foreign corporation failing to comply with the above provisions shall not be permitted to bring or maintain any action or suit in any of the courts of this state."

Now we contend that neither the making nor the performance of such a contract as the one involved here is void under any statute of the State of Mississippi nor under the decisions of the Supreme Court of Mississippi as they now stand. It will be noted that no statute of the State of Mississippi is cited which states that such contracts are void. There is no such statute.

Since the statutes do not make such contracts void, it remains to look at the decisions.

As we have said, we think that the case of Quartette Music Co. v. Haygood, supra, held such contracts to be void but, as stated above, fourteen years after that de-

cision the legislature of Mississippi enacted Section 5319 of the Code of 1942, which section includes the sentence above quoted. Now if the legislature of Mississippi intended contracts made in Mississippi by unqualified foreign corporations to be completely void, and thus unenforceable in any court of any sovereignty, all it had to do was to let stand the decision in Quartette Music Co. v. Haygood, supra. Plainly, the legislature did not so intend but enacted the last sentence of Section 5319 of the Mississippi Code of 1942 specifically to show that such contracts were not void. Otherwise there was no reason for the inclusion of the sentence above noted.

We say no other reason can be given for such enactment. This is the very nub of this case.

Counsel for Petitioner cites many cases and we shall examine some of them now. It is well to note here that Counsel for Petitioner first said that the decisions of the Supreme Court of Mississippi had held to be void contracts such as the one involved here. They now say that the decisions of the Supreme Court of Mississippi are in confusion. This is what we have said all along.

In *Peterman Construction Company v. Blumenfield*, (1930), 156 *Mississippi* 55, 125 *So.*, 548, it was held that such contracts "could not be enforced in the courts of this state" and there was used the language "voidable transaction;" in *Wiley Electric Co. v. Jackson Electric Storage Battery Co.* (1933) 167 *Miss.* 842, 147 *So.* 773, it was held that the applicable statute "closed the doors of the courts of this state to foreign corporations doing business in this state in violation of its provisions;" in *Marx & Bensdorf v. First Joint Stock Land Bank*, (1937), 178 *Miss.* 345, 173 *So.* 297, it was held that the

statutes provided that such non-complying foreign corporation "is barred from bringing and maintaining any suit in the courts of this state;" in the case of *Case v. Mills Novelty Co.* (1940), 187 *Miss.* 673, 193 *So.* 625, it was held that such contracts are "unenforceable;" in *Newell Contracting Co. v. State Highway Commission*, (1943) 195 *Miss.* 395, 15 *So. 2d* 700, it was held that such contracts are "void and unenforceable."

Certainly, here is confusion. A contract may be void and, of course, it will then be unenforceable; on the other hand, it may be unenforceable and not void at all. We do not understand that Counsel for Petitioner now contend that contracts such as the one involved here are void, but they do contend that for the federal courts to enforce such contracts as the one involved here would violate the public policy of Mississippi. Now we say if the making or performance of such contracts as the one involved here is contrary to the public policy of the State of Mississippi, then they must be void. If they are void they are completely void, void even in their very inception. They can't be void sometimes and not be void at other times. To say they are void means they are nothing.

That they are not utterly void is shown by the fact that promissory notes growing out of such transactions are valid and enforceable, even in the state courts, in the hands of innocent purchasers for value. If they were void ab initio, this could not be true.

We commented on this in our reply brief in the Court of Appeals, citing Professor Williston's comment in his work on Contracts, Vol. VI, page 5029, Sec. 1772:

"A holder in due course of a negotiable note originally given to such a corporation as part of its unauthorized

business within the state has almost universally been allowed to recover."

This comment is made in a discussion of cases where such note is held not to be void, and it is stated that "an action may be maintained on it either in the courts of another state or in the federal courts if jurisdiction can be obtained."

In the case of *Lauter v. Jarvis-Conklin Mortgage Trust Co.*, (C.C.A.6) 85 *Fed.* 694, Mr. Justice Lurton said:

"The general and well-settled rule in favor of negotiable paper is that an innocent purchaser for value before maturity is unaffected by the fact that the consideration was illegal, and the note void and unenforceable in the hands of one having notice of the facts. If the illegality of the consideration results from a statute merely prohibiting a business, or imposing a penalty, but does not declare a note or bill based upon such a prohibited transaction absolutely null and void, a bona fide holder of such paper will be protected."

In *Fritts v. Palmer*, 132 *U.S.* 282, 33 *L. Ed.* 317, 10 *S. Ct.* 93, the Court distinctly held that a contract made by a foreign corporation with a citizen of another state is not necessarily void because the corporation had not complied with the laws of such other state imposing conditions upon it prerequisite to the lawful transaction of business in such state. A tract of land in Colorado had been conveyed to a Missouri corporation in disregard of constitutional and statutory provisions which prohibited a foreign corporation from holding land in Colorado until it should acquire the right to do business therein

by complying with certain prescribed conditions. The only penalty which that statute provided was that the officers, agents and stockholders of such unqualified corporation should be personally liable on any contracts of such foreign corporation as might be in default. The Supreme Court held that the fair implication was that in the judgment of the Colorado legislature, this penalty was ample to effect the object of the statute, and therefore the courts ought not to inflict the additional, harsh penalty of forfeiting the estate conveyed to the Missouri corporation. It thus refused to treat the conveyance as void, although it had been made to a corporation forbidden to receive it.

In the same connection, we may cite *Bradford v. Indiana Harbor Belt Railroad Co.* (C.C.A. 7) 16 *Fed.* (2d) 836, *and Industrial Finance Corporation v. Community Finance Co., et al* (C.C.A. 5) 294 *Fed.* 870.

Fletcher on Corporations (Permanent Edition) Vol. 17, Sec. 8537, states the general rule in these cases as follows:

> "Where the statutes declare contracts of non-complying corporations wholly void, they are void in the Federal courts also, and the same rule applies generally where the state courts have construed contracts as void for non-compliance, but in the absence of such express statutory declaration or settled rule of judicial construction to that effect, the federal courts regard them as valid and enforceable in such courts; a statutory bar against suit by non-complying foreign corporations in the courts of the state has no application to the federal courts."

Fletcher in the same section at page 668 further says:

> ". . . Where the state authorities are in conflict and the state law seems to remain unsettled on the

subject, the federal courts may refuse to follow those (decisions) declaring contracts made without compliance with the statutes (to be) void, *where the statute does not expressly so provide.*" (Italics ours)

Fletcher further says that "the phrase 'in any court of this state (does) not embrace federal courts'." The above statement is made under the section cited above at page 672, and under note 93 he cites a number of cases in support of same.

It has also been held by this court as well as some of the state courts that where a federal statute gives an aggrieved party a right to a penalty without specifying a remedy for its enforcement, it may be enforced by an action in a state court, *unless the federal statute confines its enforcement to the federal courts. Claflin v. Houseman,* 93 *U.S.* 130, 137, 23 *L. Ed.* 838; *Penn.-Dixie Cement Corporation v. H. Wales Lines Co.,* 119 *Conn.* 603, 178 *Atl.* 659; *Eggling v. Lombardo,* 181 *Misc.* 108, 43 *N. Y. Supp. 2d* 358. The converse must also be true. That is to say, if a state penal statute expressly confines its enforcement to the state courts, it would seem obvious that the federal courts cannot enforce it. That is precisely the case here. *The state statute specifically provides for exclusion from the state courts alone.*

Furthermore, the Supreme Court of Mississippi has frequently shown, since 1928 which is the date of the enactment of Section 5319, that they do not consider such contracts void. See the cases of *Long Beach Canning Co. v. Clark,* (1925), 141 *Miss.* 177, 186, 106 *So.* 646, *and Citizens' Bank of Hattiesburg v. Grigsby,* (1934), 170 *Miss.* 655, 155 *So.* 684, 685.

Now, certainly, it cannot be said that there is anything in the statutes of Mississippi or in the decisions of the Supreme Court of Mississippi since 1928, the date of enactment of Section 5319, that makes void such contracts as the one involved here.

When we come to the question of public policy, where is the statute that says a contract such as the one involved here is contrary to the public policy of the State of Mississippi? Section 5319 certainly does not say so. It merely says that we cannot bring or maintain any suit on this contract in the state courts of Mississippi. If the legislature of Mississippi had wanted such contracts to be considered against the laws or public policy of Mississippi then the legislature had only to say so. Actually, the legislature had only to let the decision alone in Quartette Music Co. v. Haygood, supra, and such contracts would have continued to be held void, void in their very making or performance, like Sunday contracts, gambling contracts, or contracts involving the sale of intoxicating liquor. There would have been no question then but what the making or performance of such a contract as this was against the public policy of Mississippi, but the legislature did not even do this. In 1928, fourteen years after the decision in Quartette Music Co. v. Haygood, supra, the legislature enacted Section 5319 of the Code of 1942, which section specifically said that such non-complying corporations could not bring or maintain any suit in the courts of Mississippi on such a contract made by a non-complying corporation in the State of Mississippi. If the legislature intended that such contracts should be against the public policy of Mississippi, why did the legislature enact the last sentence of Section 5319? It did not have to do so. We say that the enactment of the last

sentence of Section 5319 was plainly for the purpose of showing that such contracts as the one involved here were not against the public policy of the State of Mississippi as they were held to be by the Supreme Court of Mississippi in Quartette Music Company v. Haygood, supra, fourteen years earlier, but that it was simply the public policy of Mississippi that such non-complying foreign corporation should not bring or maintain any suit on such contract in the state courts of Mississippi. Otherwise there was no reason for the enactment of this last sentence of Section 5319. Certainly, this last sentence nullifies the decision of the Supreme Court of Mississippi in Quartette Music Co. v. Haygood, supra, to the extent that that case held void such contracts as the one involved here.

Section 5339 of the Code of 1942 does not say that such contracts are against the public policy of Mississippi. It provides merely for the domestication of foreign corporations and for nothing else.

Section 5343 of the Code of 1942 does not say that such contracts as the one at bar are against the public policy of Mississippi. It simply provides for the filing with the Secretary of State by such foreign corporation of its charter or certificate of incorporation, and provides a fine of $100 for failure to do so.

Section 5344 does not say that such contracts are against the public policy of Mississippi. If does say that such foreign corporations shall not be allowed to recover on any contract made in violation of the laws or public policy but it does not say anything about the making or performance of a contract like this being in violation of the laws or public policy of the state. Of course, such

foreign corporations could not make a valid Sunday contract; could not make a valid gambling contract; could not make a valid contract to sell whiskey in violation of the laws of Mississippi.

The vice in the argument of Counsel for Petitioner is the assumption that the last phrase in Section 5344 of the Code of 1942 makes contracts like the one involved here against the public policy of Mississippi. But this is merely an assumption and it is an assumption which has no basis because the legislature of Mississippi showed, by the enactment of Section 5319 of the Code of 1942, that the only thing that was against public policy of Mississippi was for such non-complying corporation to enforce such contract in the courts of Mississippi. Apparently, the Supreme Court of Mississipi in Quartette Music Co. v. Haygood, supra, thought that what is now Section 5344 (then Section 914 of the Code of 1906) did what Counsel for Petitioner says that Section 5344 does in this case. But the legislature of Mississippi by its enactment of Section 5319 made sure that Section 5344 would do no such thing. So the public policy of Mississippi is definitely not to make contracts like the one involved here void, but only to penalize the non-complying corporation by making it pay a fine and by preventing it from enforcing any such contract in any court of the State of Mississippi. Such, and such alone, is the only public policy of Mississippi on this question.

Nor is there any comfort for Petitioner when we turn to the later decisions of the Supreme Court of Mississippi. We have already referred to most of the applicable decisions, but we now call the special attention of the Court to the case of *State ex rel. Attorney-General v.*

Edward Hines Lumber Co. et al., (1914), 106 *Miss.* 780, 64 *So.* 729. In the first place, that case was also decided in 1914, fourteen years before the enactment of Section 5319 of the Code of 1942. Everything that has been said at bar with reference to the case of Quartette Music Co. v. Haygood, supra, applies to the case last cited. In the second place, the course of action involved in the Hines Lumber Company case was specifically made a violation of the public policy of Mississippi by Section 903 of the Mississippi Code of 1906. This is not true regarding the contract involved in this case. In the third place, to have allowed a foreign corporation to escape the application of Section 903 would have discriminated against domestic corporations of Mississippi. Such is not true in the case at bar because a citizen of Mississippi, or a domestic corporation of Mississippi, or even an individual citizen of another state could have enforced the contract involved here in the courts of Mississippi.

In other words, all the statutes involved in this case are simply designed for the purpose of revenue, simply intended to force any foreign corporation doing business in the state of Mississippi to put itself upon the same footing as a domestic corporation of Mississippi. That is all, and that is all that is shown by either the statutes of Mississippi or by the decisions of the Supreme Court of Mississippi since the enactment of Section 5319 of the Mississippi Code of 1942 in the year 1928. So the whole argument of Petitioner that to allow us to maintain this suit in the federal courts would nullify the public policy of Mississippi falls to the ground, for the reason that he has no basis anywhere for the assumption that for the federal courts to allow us to proceed with a suit on a contract of this kind would be against the public policy of

Mississippi. In other words, his basic premise simply does not exist.

II

The doctrine set out in the cases of Angel v. Bullington, supra, and Guaranty Trust Co. v. York, supra, does not apply to the case at bar.

What Counsel for Petitioner have to say about the cases of *Erie R. R. Co. v. Tompkins,* (1948), 304 *U. S.* 64, 82 *L. Ed.* 1188, 114 *A. L. R.* 1487, *Guaranty Trust Co. v. York,* (1945), 326 *U. S.* 99, 89 *L. Ed.* 2079, 160 *A. L. R.* 1231, *and Angel v. Bullington,* (1947), 330 *U. S.* 183, 91 *L. Ed.* 832, is all very interesting but has nothing to do with the issue involved here.

Those cases simply say that the federal courts will not permit recovery directly against the public policy of a state. No doubt that is true. Certainly, if it is true, then this Court will not refuse to let Respondent proceed with this suit when it is clear that the only public policy of Mississippi in a case like this is to refuse to allow a suit to be brought or maintained in the state courts. If this Court should do what Petitioner wants it to do, then this Court would be proceeding directly against the public policy of Mississippi because Section 5319 of the Code of 1942 shows what the legislature of Mississippi wanted the public policy of Mississippi to be. It wanted non-complying foreign corporations excluded from the state courts. Otherwise, there was no reason for the inclusion of the last sentence of Section 5319.

Certainly, the case of Angel v. Bullington, supra, cannot apply to this case. With all due deference to this Court, we think the real decision in Angel v. Bullington

was based, and rightly based, upon *res adjudicata*, and once we accept the decision of the North Carolina Court as res adjudicata, that would seem to end any further inquiry and to preclude the possibility of federal courts sitting in North Carolina or elsewhere deciding the case upon any other or different grounds.

However, if this is not true, still Angel v. Bullington, supra, cannot apply here for the reason that a contrary decision in Angel v. Bullington would have discriminated against the citizens of North Carolina and the domestic corporations of North Carolina and for the further reason that the North Carolina statutes plainly showed that the recovery of a deficiency judgment by any litigant, individual or corporate, foreign or domestic, resident or non-resident, was against the public policy of North Carolina.

To allow Respondent to proceed in this case would allow it to do only what a citizen of Mississippi could do or what a domestic corporation in Mississippi could do. The only possible discrimination that could be made by allowing it to proceed in this suit in the federal courts would be to favor it over non-complying foreign corporations whose demands would not exceed $3,000. That is all and the same thing happens all the time in effect, in various suits where the amount involved is less than $3,000. If such a slight discrimination as this is to be voided, then we shall just have to do away entirely with the diversity statutes. Of course, we would not attempt to argue that this Court should do something that would discriminate against a citizen of Mississippi or a domestic corporation of Mississippi.

We submit that it is obvious that to allow Respondent to proceed in the federal courts with this suit cannot possibly discriminate against any citizen of Mississippi, any domestic corporation of Mississippi, or even any non-resident individual.

In addition to this, the doctrine of Angel v. Bullington, supra, cannot apply in this case for the reason that it would nullify the doctrine laid down in the case of *Brace v. Gauger-Korsmo Construction Co.*, (1929, C.C.A. 8th), 36 *F. 2d* 661, (*Certiorari denied* 1930, 281 *U. S.* 738, 50 *Supt. Ct.* 333, 74 *L. Ed.* 1153).

Under the doctrine of the case last cited where the statutes of a state do not make contracts void such as the contract involved in the case at bar, and where the decisions of the highest court of the state are in conflict, still the non-complying foreign corporation can proceed in the federal court. Now this doctrine is entirely different from that laid down in the case of *David Lupton's Sons Co. v. Automobile Club of America*, (1911), 225 *U. S.* 489, 32 *S. Ct.* 711, 56 *L. Ed.* 1177.

The doctrine of Brace v. Gauger-Korsmo Construction Co., supra, exactly fits this case. The Mississippi statutes do not make contracts void such as the one involved here. The decisions of the Supreme Court of Mississippi since the enactment of Section 5319 of the Mississippi Code of 1942 are in confusion as Counsel for Petitioner admit. Therefore, under the doctrine of Brace v. Gauger-Korsmo Construction Co., supra, Respondent is still entitled, for this reason, to proceed with this suit in the federal courts, even though it could not proceed with it in the state courts of Mississippi.

Counsel for Petitioner say that the doctrine of Brace v. Gauger-Korsmo Construction Co., supra, was wiped out by the decision of this Court in Angel v. Bullington, supra, but nothing in the opinion in the latter case says so. This is a novel doctrine, a doctrine to the effect that the Supreme Court overrules a former decision, which decision sets up an entirely different doctrine, without even mentioning the decision or the doctrine overruled. We do not think it a sound doctrine, and we shall continue to think that the doctrine laid down in Brace v. Gauger-Korsmo Construction Co., supra, is still the law until this Court expressly overrules it.

III

Even if the statutes involved in this case are held to establish the public policy of the State of Mississippi, and if that public policy is as broad as Petitioner contends, which we deny, nevertheless such statutes are penal statutes and will not be enforced by the courts of another sovereignty.

The following definitions, taken from cases considering statutes regulating corporations and their officers, may be helpful at this point:

In Brown v. Kildea, Supreme Court of Washington, 108 *Pac.* 452, a suit by a stockholder against officers of a corporation for a statutory penalty, the court said, among other things:

> "The appellants contend that this statute is a penal one and should be strictly construed, whilst the respondent asserts that, insofar as it affects the case at bar, it is remedial and should receive a liberal interpretation. We think the appellants have

the correct view of the statute. Under the statute the officer who violates its provisions is deemed guilty of a misdemeanor, the penalty to the state being imprisonment in the county jail not more than one year, or by fine not exceeding $500, or by both such fine and imprisonment . . . and to the injured party a penalty of not less than $100 nor more than $1,000, and all damages which he sustains. We agree with the learned trial court that a statute may be penal in part and remedial in part. *The remedial part of this statute, however, is the provision for the recovery of actual damages. The penalty is not imposed as compensation, but as a part of the punishment of the offending officer. A statute which subjects one person to the payment of a sum of money to another, without reference to any actual injury and without requiring him either to allege or prove an actual injury, is a penal statute.*" (Italics ours)

In the above case, the court further pointed out that where an action is founded entirely upon a statute having for its object the recovery of a penalty or forfeiture, the statute is clearly penal; but that where it gives the injured party enhanced or double damages for a wrong suffered or a right violated, it is remedial. Of course, in the case at bar, the defendant had no right to make any requirement of a foreign corporation and no right to sue it for damages because of its failure to domesticate. He could only exact a penalty in an arbitrary amount—the amount of the contract sued on—if the foreign corporation sued for same in the state courts.

Another good definition of penal statutes is contained in *People v. Crucible Steel Co. of America*, 151 *Mich.* 718, 115 *N.W.* 705, where the court said:

"We understand a penal statute to be a statute imposing a penalty for doing that which the statute

prohibits or for omitting to do that which the statute requires, or, as is stated in 22 Am. & Eng. Encyclopedia of Law (2d Ed.) page 654, 'a penal statute is one which enforces a forfeiture or penalty for transgressing its provisions or doing a thing prohibited'."

We asserted in our prior brief that we felt that the federal courts would not undertake to enforce the penal statutes of a state. That, without question, appears to be the general rule of so-called private international law. There is one qualification of the rule. Whether a court will enforce a penal law of another sovereignty depends upon whether it is penal in the sense of punishing an offense against the public justice of the state, or whether its purpose is to afford a private remedy to a person injured by the wrongful act. In the first sense, it is a penal law, and is not enforceable in the courts of another sovereignty.

Huntington v. Attrill, 146 *U. S.* 657, 36 *L. Ed.* 1123, 13 *S. Ct.* 224.

Fletcher on Corporations, Volume 17, Section 8537 is authority for the proposition that a statute excluding a non-complying foreign corporation from the courts of the state is penal in nature. It is penal in the sense of preventing a public injustice and not in the sense of furnishing a remedy to some person who is aggrieved by a wrongful act. He quotes the following from one of the cases on the subject, which seems to us to state the rationale of the rule unusually well:

"It is a familiar principle that the federal courts do not follow the penal statutes imposing penalties of prohibition that relate only to matters of procedure and practice or to matters of jurisdiction. The legislature of a state cannot shut up the federal

courts, nor deny parties access thereto. They may prescribe rules of property and declare contracts within their jurisdiction null and void, and thereupon the federal courts will enforce the rules of property and refuse to enforce the void contracts; but if the legislature leaves the contract valid, enabling the parties to invoke it in jurisdictions that are not amenable to the legislature of Tennessee, I see no reason why the federal courts may not enforce such contracts although their enforcement is prohibited by the courts of the State . . . It does not follow from this that they will refuse to enforce valid contracts that are harmless in themselves and non-enforceable in State courts only because they are not in conformity to certain rules and regulations of an administrative character necessary to be complied with before suit can be brought upon them in the State courts."

Eastern Buildings & Loan Assn. v. Bedford, D. C. Tenn. 88 *Fed.* 7.

The case of *State of Wisconsin v. Pelican Ins. Co.*, 127 *U. S.* 265, 8 *S. Ct.* 1370, 32 *L. Ed.* 239, has been cited in support of the view that this Court considers the states as sovereignties foreign to the Federal sovereignty when questions of private international law are involved. In that case, the State of Wisconsin, on a judgment obtained in one of its courts against a Louisiana corporation, brought suit in the United States Supreme Court. On the theory that Wisconsin was a foreign sovereignty in this sense, and that the suit was founded upon a penal statute, the court held that it would not entertain the suit to enforce that statute, saying (127 U. S. at page 289, 32 L. Ed. 239, 8 S. Ct. at page 1374):

"By the law of England and the United States the penal laws of a country do not reach beyond its own territory except when extended by express treaty or

> statute to offenses committed abroad by its own citizens; and they must be administered in its own courts only, and cannot be enforced by the courts in another country."

That case has been cited subsequently by the Supreme Court of the United States and does not seem to have been overruled or qualified. Mr. Justice Gray, who wrote the opinion in Huntington v. Attrill, supra, referred to the holding in Wisconsin v. Pelican Ins. Co., saying (146 U. S. at page 672, 13 S. Ct. at page 229, 36 L. Ed. 1123):

> "Upon similar grounds, the courts of a state cannot be compelled to take jurisdiction of a suit to recover a like penalty for a violation of a law of the United States."

The effect of Wisconsin v. Pelican Insurance Co., supra, does not seem to us to be weakened by the recent case of *Testa v. Katt*, 330 *U.S.* 386, 91 *L. Ed.* 967, 67 *S. Ct.* 810, 172 *A. L. R.* 225, overruling a decision of the Supreme Court of Rhode Island, because that case bases its holding upon the supremacy clause, Article VI of the Constitution of the United States, in ruling that a state must enforce a penalty included in a statute of the United States. The effect of that decision, as we see it, is that the rule of private international law mentioned above must give way in the face of the supremacy clause of the Federal Constitution when Congress sees fit to enact a statute applicable in all states and containing penalty provisions. It can hardly follow where the question involved is whether a federal court will enforce a state penal statute that the question is foreclosed by Testa v. Katt, supra, because there is no federal constitutional question involved. In addition, it seems clear that there is a different type of statute involved in the Testa case

—a statute that gives treble damages, and is, therefore, under the definitions, remedial. There is, therefore, no reason why the established rule of private international law should not govern, and the law as announced in Wisconsin v. Pelican Insurance Co., supra, should apply to the case at bar.

It should be observed that the fact that the statute involved in the case at bar is penal in the sense of punishing an offense against the public justice of the state would seem to be recognized by petitioner in the insistence of his counsel upon the question of public policy. Petitioner would seem to be confronted by this dilemma, that if his contention about respondent's act being violative of the public policy of Mississippi is sound, the effect of the statutes invoked is punitive and penal in the strict sense. The test is the legislative intent and it is clear that such punishment was intended to be penal in the strict sense—to protect and preserve public justice. Therefore, petitioner is cast under either view. If public policy was not violated, the contract cannot be void. If it was violated, the punishment is penal and a Federal court will not enforce a state's penal statutes.

Thus, if it is determined that the statute involved is a penal statute; that it is penal in the sense of punishing an offense against the public justice of the State; and that, under established rules, the federal courts will not undertake to enforce penal statutes of the states, this proposition must be conclusive against Petitioner; and it must be held that Respondent is entitled to try its suit on the merits in the federal district court.

Whether statutes are penal in the primary sense cannot depend upon whether they are invoked by a public authority or a private litigant. In the multitude of legal situations that might arise under such statutes, that could hardly be a safe or logical test.

The true test is the intent of the legislature. Was the legislature trying to safeguard some phase of public justice and punish all who offended against its enactment; or was it merely trying to enlarge the remedy offered by the common law for persons injured by the wrongful acts of others?

In this case, it must be answered that the legislature was concerned with public justice. It was laying down a state-wide rule and providing penalties for its infraction.

It is one thing to say, under Erie v. Tompkins, supra, that Federal Courts must follow State statutes and decisions with respect to such matters as statutes of limitation, burden of proof, and contributory negligence; but it is quite another thing to say that State statutes and decisions may define what kinds of suits may be brought by litigants in Federal Courts sitting in such State.

The doctrine of Wisconsin v. Pelican Insurance Company, supra, and Huntington v. Attrill, supra, that where a statute is penal in the strict or primary sense it will not be enforced in the courts of another jurisdiction, but that it will be enforced if it is penal in the secondary sense of merely affording a remedy to some private in-

dividual who has been injured by a wrongful act, has been recognized by this Court in the following cases:

Yarbrough v. Yarbrough, 290 *U. S. at* 216, 78 *L. Ed. at* 278;

Broderick v. Rosner, 294 *U. S. at* 642, 79 *L Ed.* 1107;

Texas v. Donohue, 302 *U. S. at* 288, 82 *L. Ed. at* 266, 268;

Overnight Motor Transport Co. v. Missell, 316 *U. S. at* 583, 86 *L. Ed. at* 1691;

Magnolia Petroleum Co. v. Hunt, 320 *U. S. at* 438, 88 *L. Ed. at* 155. *See footnote No.* 4 *page* 155 *of*, 88 *L. Ed.*

Georgia v. Pennsylvania Railroad Co. 324 *U. S. at* 446, 89 *L. Ed. at* 1056.

The question was expressly pretermitted, apparently not being necessary to the decision, in *Milwaukee Co. v. White*, 296 *U. S.* 268, 88 *L. Ed.* 220 (*See* 228-229 *of* 88 *L. Ed.*).

For the same reason which prevented Testa v. Katt, supra, from weakening the effect of this doctrine when invoked in a case like the one at bar, we submit that the case of *Sherrer v. Sherrer*, 334 *U. S.* 353, 92 *L. Ed.* 1062, does not result in eliminating either the doctrine or the cases cited. That reason is that in Sherrer v. Sherrer, supra, the point involved was one relating to res adjudicata and the full faith and credit clause of the Constitution of the United States. Neither question is involved here, and we strongly urge that the authority of Wisconsin v. Pelican Insurance Co., supra, and Huntington v. Attrill, supra, insofar as they lay down the rule with respect to the courts of one sovereignty not enforcing

the penal statutes of another sovereignty in the primary sense, is unimpaired and applicable here.

If a federal court should feel constrained, notwithstanding the authorities cited above, to apply the doctrine of Erie v. Tompkins, supra, in a case like that at bar, it would still be compelled, under the very doctrine of Erie v. Tompkins, to ascertain what the Supreme Court of Mississippi has determined to be the law of Mississippi with respect to this rule about penal statutes. The discovery would then be made that the State of Mississippi itself has recognized the rule, which has been cited with approval in the following cases:

Bank of Hickory v. May, Sheriff et al 119 *Miss.* 241, 80 *So.* 704.

W. T. Rawleigh Co. v. Hester, 190 *Miss.* 329, 200 *So.* 250 (*See headnote* 4).

Thus one seems to find oneself confronted with the long-established rule of private international law which provides that a Federal district court in Mississippi should not enforce a law of the State of Mississippi which is penal in the primary sense; and, at the same time, if a federal district court should feel itself constrained by the doctrine of Erie v. Tompkins, supra, to look to the law of Mississippi for the rule of decision in the case, it would find that the State of Mississippi by its highest court has approved that same rule of private international law. We can, therefore, see no escape from the conclusion that the Mississippi statutes invoked by Petitioner cannot constitute a bar to Respondent's being permitted to try its suit on the merits in the federal district court in Mississippi.

One question seems to remain. Are we correct in asserting that the statutes of Mississippi which have been invoked here are penal in the strict or primary sense of punishing a violation of public justice and are not merely to afford a remedy for the protection of private individual rights? We cannot conceive that the State of Mississippi enacted these statutes simply to afford individual defendants a defense in cases of this kind. It seems obvious that the legislative purpose was to require all foreign corporations doing business in Mississippi to submit themselves to the laws of the State and that the penalties contained in these statutes are designed as punishment for any foreign corporation failing to comply with their requirements. This is a punishment to satisfy public justice. We have already cited Fletcher on Corporations to the effect that statutes like these are penal in the strict or primary sense. Another consequence of that fact is that they will be strictly construed against the litigant invoking them and in favor of the litigant against whom they are invoked. Therefore, we feel that we are entitled to urge that these statutes be not extended beyond their plain language. That language could not be more explicit. It provides that offending foreign corporations shall not maintain suits on their contracts in the state courts. To extend that prohibition to the federal courts by interpretation would, we think, violate the fundamental rules of statutory construction with respect to penal statutes.

That these and analogous statutes are regarded as penal in the strict sense, and that they must be strictly construed in favor of the litigant against whom they are invoked, is, we think, shown by the following authorities:

Bank of Hickory v. May, supra.

W. T. Rawleigh Co., Inc. v. Hester, supra.
People v. Crucible Steel Co. of America, supra.
Brown v. Kildea, supra.
Alexander Film Co. v. State, 201 *Ark.* 1052, 147 *S. W. 2d*, 1011.
Murray Tool & Supply Co. v. State, 203 *Ark.* 874, 159 *S.W. 2d*, 71.

THE OPINION OF THE COURT OF APPEALS

The opinion of the Court of Appeals is in the record. (R.P. 81). It is also reproduced in Petitioner's brief. It contains a penetrating analysis of the decisions of the Supreme Court of Mississippi. It is particularly clear in the reasons given by the court for concluding that where the Supreme Court of Mississippi occasionally used the word "void," it did not mean absolutely null, but only void in the sense of being unenforceable in the State courts. (R.P. 85-86).

The quotation by the Court of Appeals from Peterman Construction and Supply Company v. Blumenfeld, supra, at the top of page 86, is particularly striking. The Court of Appeals quotes from that case language of the Mississippi Supreme Court to the effect that under Quartette Music Co., v. Haygood, supra, such contracts *cannot be enforced in the State courts.* And immediately following that quotation the Supreme Court of Mississippi says, "*that* is the policy of this state . . ." In other words, the public policy of the state is not that such contracts shall be absolutely null and void. The public policy of the state is only that they shall not be enforced in the State courts. Of course, that has been Respondent's contention since the beginning of this controversy.

As a further reason for its conclusion, the Court of Appeals makes this very significant comment about the

latest Mississippi case, the Newell case (Newell Contracting Co. v. State Highway Commission, supra):

> "We think the cases cited in the Newell Contracting Co. case, with the exception of the Haygood case, all indicate that under the Mississippi statutes the prohibition merely closes the door of the State courts to a foreign corporation which has failed to qualify to do business in that State. That this is the true interpretation of the Mississippi law is made clear in Long Beach Canning Co. v. Clark, 1926, 141 Miss. 177, 106 So. 646, and Citizens' Bank of Hattiesburg v. Grigsby, 1934, 170 Miss. 655, 155 So. 684 . . ."
>
> "When, therefore, the court in the Newell case used the words 'void and unenforceable' we must interpret 'void' as meaning that no relief could be granted to a non-complying foreign corporation in view of the statute. Suppose a Mississippi resident had sued a non-resident corporation in the Mississippi court for breach of contract, the contract having been entered into in Mississippi, would it be contended that the non-resident corporation could set up that since it had not qualified to do business in the State of Mississippi, the contract entered into was void? We think not. The Mississippi statutes deny to the non-complying corporation permission to bring a suit in the State courts; but they do not prevent such a corporation from being sued upon its contract in the State courts."

PETITIONER'S BRIEF

The line of cleavage between our views and those of Petitioner's counsel is clear from a consideration of the respective briefs as a whole. However, there are a few points in Petitioner's latest brief to which we would like to refer specifically.

Petitioner places much emphasis on Sec. 5344 of the Mississippi Code, but that section obviously is intended to provide that agents of foreign corporations shall be able to act with the same force and validity as agents of private persons; and the statement that such corporations shall not commit any act in violation of the law or policy of the state looks forward to a time when they have qualified and are doing business. That is to say, it was intended to place them under the same prohibition as to Sunday contracts, wagering contracts, and similar regulated or prohibited matters as residents of the State, individual or corporate. This section definitely does not say that failure to qualify violates the policy of the state. As we have elsewhere insisted, the policy of the state cannot go any further than to exclude offending foreign corporations from the state courts.

Moreover, whether Petitioner feels that his argument falls under the Judiciary Act or under the doctrine of Erie v. Tompkins, supra, he is confronted with the same ultimate barrier to his position as that stated above, that is to say, that the law of Mississippi provides for nothing beyond exclusion of Respondent from the state courts.

Petitioner further quotes from the opinion of this Court in Guaranty Trust Company v. York, supra, to the effect that—

> "The source of substantive rights enforced by a federal court under diversity jurisdiction, it cannot be said too often, is the law of the states. *Whenever that law is authoritatively declared by a state . . . such law ought to govern in litigation founded on that law, whether the forum of application is a state or a federal court . . .*" (Italics ours)

To that quotation, we feel that no one can take any exception. We say further that it supports Respondent's contentions rather than Petitioner's, for the following reasons: (1) this litigation *is not founded* on the Mississippi statutes elsewhere cited by Petitioner; (2) the statutes in question do not create substantive rights but provide penalties; and (3) even assuming that the quotation is otherwise applicable to our situation, the law of Mississippi has been authoritatively declared against Petitioner's contentions and in favor of ours, in that that law authoritatively declares that the state shall exact, in addition to fines, only the exclusion of offending foreign corporations from the state courts. There has certainly been no authoritative declaration by the law of Mississippi that contracts like the one in suit are void or that suits on them may not be maintained in federal courts.

In the last paragraph of their Point I, Petitioner's counsel say that Section 5344 of the Mississippi Code is all-embracing and that a contract entered into in violation of the laws of the state is unenforceable in any court. We repeat that a careful reading of that section will show that that is much too broad a statement of its provisions.

Again in their heading under Point II, Petitioner's counsel say:

> "The contracts sued upon are unenforceable in the federal court whether the contracts are absolutely void or merely unenforceable because of the failure of the respondent to qualify to do business in the state."

If they had stated the effect of the words of the statutes themselves—unenforceable in the courts of this state—their Point II would fall of its own weight. Their ar-

gument would be negatived in its very statement.

Elsewhere, Petitioner's counsel say:

> "Narrowing the issues to the least common denominator, the precise question presented is as to whether or not the Respondent might have recovered upon the contracts in question in the state court. It being conceded that no such recovery could be had, it is immaterial whether the contracts are absolutely void or merely unenforceable."

That is certainly assuming the very thing we are trying to determine, and we submit it is begging the very question in issue.

Petitioner's counsel have gone to considerable pains to argue extensively, and quote from, the case of *John Hancock Mutual Life Insurance Co. v. Yates*, 299 *U.S.* 178, 81 *L. Ed.* 106; but it seems to us that that whole case can be very simply explained on the ground that the court applied the lex loci contractus.

Petitioner's counsel also say that we have not at any point denied that for purposes of diversity jurisdiction, federal courts are merely other courts of the state. We realize that the courts have often used that phraseology, and in many cases it gives an accurate picture of the situation. However, we have been under the impression that everything in our several briefs, including this one, is rather pointedly directed to the denial of that thesis under the situation here presented, and that to adopt such a view here would be a gross distortion of the realities involved.

In their reply brief to our brief on the application for certiorari in this case, Petitioner's counsel also asserted.

at page 8, that the statutes involved here are substantive, and that we have not contended in any brief that they are merely procedural. We think we have vigorously contended that they are not substantive. If we have not, we do so now. But even if it be admitted—for the sake of argument only for we make no such admission in reality—that they are substantive and even that they declare the public policy of Mississippi, we say further that they are penal in the strict sense and will not be enforced in the courts of another sovereignty.

CONCLUSION.

In conclusion, we say that the Court of Appeals has decided this case correctly and that its judgment should be affirmed.

Respectfully submitted.

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CERTIFICATE

I certify that I have this day served notice of the filing of respondent's brief on the hearing of this cause in the Supreme Court of the United States, together with a copy of the brief, upon William H. Watkins, Esq., Jackson, Mississippi, James McClure, Esq., and J. W. Kyle, Esq., Sardis, Mississippi, counsel for the petitioner herein, by mailing same to each of them at their offices.

Dated at Memphis, Tennessee this 19 day of March, 1949.

John A. Osmach

Of Counsel for Interstate Realty Company, Respondent